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सं. 5] नई दिल्ली, फरवरी 1—फरवरी 7, 2009, शनिवार/माघ 12—माघ 18, 1930
No. 5] NEW DELHI, FEBRUARY 1—FEBRUARY 7, 2009, SATURDAY/MAGHA 12—MAGHA 18, 1930

इस भाग में भिन्न पृष्ठ संख्या दी जाती है जिससे कि यह पृथक संकलन के रूप में रखा जा सके
Separate Paging is given to this Part in order that it may be filed as a separate compilation

भाग II—खण्ड 3—उप-खण्ड (iii)
PART II—Section 3—Sub-section (iii)

केन्द्रीय अधिकारियों (संघ राज्य क्षेत्र प्रशासनों को छोड़कर) द्वारा जारी किए आदेश और अधिसूचनाएं
Orders and Notifications issued by Central Authorities (other than the Administrations of Union Territories)

भारत निर्वाचन आयोग

EXHIBIT-126

नई दिल्ली, 18 दिसम्बर, 2008

आ. अ. 8.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, निर्वाचन आयोग वर्ष 2004 की निर्वाचन अर्जी सं. 1 में महाराष्ट्र उच्च न्यायालय, औरंगाबाद के तारीख 16-10-2008 के आदेश को एतद्वारा प्रकाशित करता है।

(आदेश इस अधिसूचना के अंग्रेजी भाग में छपा है।)

[सं. 82/महा.-लो. स./ (1/2004)/2008]

आदेश से,

सत्येन्द्र कुमार रूडोला, सचिव

ELECTION COMMISSION OF INDIA

New Delhi, the 18th December, 2008

O.N. 8.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgment of the High Court of Maharashtra, Aurangabad dated 16-10-2008 Election Petition No. 1 of 2004.

IN THE HIGH COURT OF JUDICATURE OF
BOMBAY BENCH AT AURANGABAD

[ORDINARY ORIGINAL CIVIL JURISDICTION]

ELECTION PETITION NO. 1 OF 2004

PETITIONER

Laxman Kondiba Dhobale, Age : 52 years, Occupation Social and Political Worker, R/at Savali Housing Society, Taluka Mangalvedha, District Solpaur.

V.

RESPONDENT

01. Sow Kalpana Ramesh Narhire, Age : 34 years, Occupation Social and Political Worker R/at Neeraj Nivas, Punarwaseet Savargaon, At Post and Taluka Kallam, District Osmanabad.

02. Kanifnath Dulha Devkule, Age : 38 Years, Occupation Contractor, R/at Prabhat Building, Anand Nagar, at Post Osmanabad, Taluka and District Osmanabad.

03. Balaji Baburao Tupsundare, Age : Adult, Occupation Business, R/at Rajiv Gandhi Nagar, Yedshi Road, At Post Osmanabad, Taluka and District Osmanabad.

04. Kadappa Kondiba Gade, Age : Adult, Occupation Business, R/at G-11 Gokul Apartment, Naikwadi Plots, Samata Nagar, At and Post Osmanabad, Taluka and District Osmanabad.

05. Sandipan Rama Zombade, Age : Adult, Occupation Business, R/at Nagnath Road, Buddha Nagar, at Post Osmanabad.

06. Navnath Dashrath Uplekar, Age : Adult, Occupation Agriculturist and Social Worker R/at Upala (M), Taluka and District Osmanabad.

07. Vitthal Kundlike Raut, Age : Adult, Occupation Agriculturist, R/at Wakudi, Taluka Paranda, District Osmanabad.

AND

NOTICEE NO. 1

01. Shri Shrikrushna alias Dadasaheb Sakharajji Kshirsagar, R/o Choure Nagar, Suit Girni Road, Saroj Colony, Amravati, District Amravati.

NOTICEE NO. 2

02. Shri Bal Keshavrao Thackeray, R/o. "Matoshri", 25, Kala Nagar, Bandra (East), Mumbai-400051.

Shri S. V. Kanetkar, Advocate, with Shri D. B. Bhange, Advocate for the petitioner.

Shri A. M. Kanade, Advocate, with Shri B. R. Sontakke Patil, Advocate for respondent No. 1.

Shri V. S. Tanawade, Advocate, for respondent No. 3.

Smt. Vasundhara Rao, Advocate, for respondent No. 6. Respondents No. 2, 4, 5 and 7 are served and absent.

AND

Shri G. K. Thigle, Advocate for Noticee No. 1.

Shri B. D. Joshi, Advocate, with Shri S. M. Godsay, Advocate, for Noticee No. 2.

CORAM : N. V. DABHOLKAR, J.

JUDGEMENT RESERVED ON : 8th August, 2008

JUDGEMENT PRONOUNCED ON : 16th October, 2008

JUDGEMENT:

1. This is an election petition under Section 81 of the Representation of the People Act, 1951 (henceforth referred to as "RP Act" for the sake of brevity), challenging election of respondent No. 1 Sow. Kalpana Narhire, as a Member of Parliament, from Osmanabad (Maharashtra) Constituency No. 36 (S.C.), at the elections held in April 2004, the result of which was declared on 13-05-2004.

By the election Petition, petitioner has sought a declaration of election of respondent No. 1 to be void. He has also sought a declaration under Section 101 of R. P. Act that he is duly elected candidate from the said Constituency, at the challenged election. In the alternative, petitioner prays for directions to hold fresh elections from the said Constituency.

For the sake of brevity, I am going to refer the Election Petitioner as "P", the elected candidate—respondent No. 1 as "R1" and the two Noticees as "1" and "2", respectively.

2. In this matter, which was assigned to the undersigned after two predecessors recorded "not before me" and in which issues were already framed, recording of evidence was commenced on 21st July, 2006 with deposition of P. P. examined in all 16 witnesses and closed the evidence by a purshis (Exh.-78) on 07-02-2007. R1 has examined 10 witnesses including her deposition as RW5, between 26-02-2007 to 18-04-2007. The arguments were advanced and heard on 24th and 25th April, 2007 and also on 3rd and 4th May, 2007 under the belief that those were for final disposal of the election petition. Subsequently, all of us (the Court and the Lawyers) realized that the stage of disposal of election petition by final verdict with a reasoned judgement had not reached. During the course of his arguments, advocate for R1 referred to Sections 98 and 99 of the RP Act. Till then, neither of the lawyers had ever invited this Court to issue notices to S/Shri Dadasaheb Kshirsagar and Balasaheb Thackeray, although petition alleges these individuals to have indulged into "corrupt practice" as defined under Section 123 (4) of the RP Act.

It is a peculiarity of this election petition that it does not allege the returned candidate R1 herself having indulged into commission of any corrupt practices, but third persons are alleged to have indulged into such practices in the interest of R1. Compliance of Section 99 and more particularly regarding notices as required by proviso (a), as also opportunity of cross examining the witnesses as required by proviso (b) of clause (b) of sub-section (1) of Section 99, was, therefore, inevitable.

Reliance was placed by learned counsel for P upon the judgment of the Honourable Apex Court in the matter of Manohar Joshi V/s. Nitin Bhaurao Patil and anr. 1996 (1) SCC 169, although for some other purpose, in the said decision the Honourable the Apex Court has interpreted the purport of Sections 98 and 99 of the RP Act.

By referring to observations of the Hon'ble Apex Court in the matter of Manohar Joshi (supra) and more particularly as contained in paragraphs 54, 55, 57, 58 and 59, learned counsel for R1 ended his arguments, by referring to Sections 98 and 99 of the RP Act and reminded this court that it will have to name the persons who will be held guilty of having indulged into corrupt practices and before doing so, this court will have to issue notices to them.

Observations in the matter of Moreshwar Save V/s. Dwarkadas v. Pathrikar. 1996 (1) SCC 394, guided us as regards the course to be adopted, in order to comply with requirement of Section 99 of the RP Act. Consequently, a lengthy order was delivered on 4-6-2007 which did not decide the election petition, but directed the noticees (Sarvashree Dadasaheb Kshirsagar and Balasaheb

Thackeray), asking each of them to show cause as to why he should not be named as a person having been guilty of corrupt practice of the nature alleged in the petition. It was directed to be communicated to them that they will have a right to file say and also to cross examine the witnesses already examined by the High Court and who have given evidence against them, as also of calling evidence in their defence.

By the said lengthy order, I have also taken an opportunity to decide issue Nos. 2(e) and 5. Issue No. 5 was pertaining to maintainability of the Election Petition for non compliance of Section 81 (3) read with Section 86 (1). My learned predecessor had refused to deal with the issue, as a preliminary issue. R1 had approached the Honourable the Apex Court against the negative inclination shown by my learned predecessor and we had proceeded with the Election Petition, since the Hon'ble Apex Court had not stayed the matter, in spite of approach to it by R1. Since the arguments were advanced, as if for the final disposal of the Election Petition, all the arguments on this issue were submitted and finding on the same was not required to be deferred for want of notices as per proviso (a) to clause (b) of sub-section (1) of Section 99. The preliminary objections were raised by applications (Exhs. 11 and 16), as also in paragraphs 1-A to 1-D of the written statement and those are dealt with at length in paragraphs 13 and 14 of the said order dated 4-6-2007.

Allegation of indulgence into corrupt practice, in the interest of R1, was made against three individuals, Shiv Sena MLA Shri Shivsharan Birajdar being the third one, apart from the two notices. Upon considering the material as against Shri Shivsharan Birajdar in paragraph 11 of the order dated 4-6-2007, it can be realised that the utterances of P, to which Shri Birajdar referred during his speech in the meeting dated 13-4-2004, were not criticism regarding private character of P. But, it was attributed to P in his capacity as MLA. Since the comments by Shri Birajdar about conduct of P, were found to be criticism against his character as MLA, finding that Section 123 (4) was not attracted, notice as required by proviso (a) to clause (b) of sub-section (1) of Section 99 was not addressed to Shri Birajdar. In doing so, I have also answered issue No. 5, as drafted in the order dated 4-6-2007, in the negative. Needless to say that, issues No. 3 and 4, as then framed, shall also stand answered in the negative, so far as those related to Shri Shivsharan Birajdar.

I believe, P, if aggrieved by such findings, which are rendered at interlocutory stage against him, shall have a right to challenge those in the appeal that may be preferred by him in case final decision of Election Petition goes against him, under Order 43 Rule 1A of the Code of Civil Procedure, 1908 read with Section 87 (1) of the RP Act. In order to shorten the length of the matter, I do not intend to repeat the things, at least in details; which are already

recorded in the order dated 4-6-2007 ("Earlier Order" for brevity). For these reasons, it is desirable to treat the said order (Exh. 101-A) as part and parcel of this judgment and hence, whenever a certified copy of the judgment would be asked for, the applicant should be furnished a copy of this judgment, along with a copy of the order dated 4-6-2007 (Exh. 101-A), as appendix to this judgment.

03. The pleadings of P and R1 are referred to in details in paragraphs 2 and 3 respectively of the Earlier Order and hence, I intend to give a brief resume of those hereinbelow.

Election in question was declared by Notification dated 24-3-2004, polling took place on 20-4-2004 and the results were declared, after counting, on 13-5-2004. There were 6,37,937 valid votes. P was polled 2,92,787 whereas R1 got 2,94,436 votes. Thus, P was defeated by R1 with a margin of only 1,649 votes. It was the contention of P that all the while he had claimed to be Hindu Mang by caste and he never claimed to be Holar, although both the castes fall in Scheduled Caste category. According to P, in 36 Osmanabad (S. C.) Parliamentary Constituency, 20% voters belong to backward caste and 1/4th of those (about 5% of total voters) are from Matang (Mang) community. According to P, Bahujan Majoor Party, of which N1 claims to be National President, did not field any candidate of its own, but fully supported candidature of R1.

Corrupt practices, by which the election result was alleged to have been tilted in favour of R1 to the prejudice of election prospects of P, are in three parts. On 5-4-2004, N1 held press conference at 8.30 p.m. at room Nos. 105/106 of Hotel Samarth at Osmanabad, booked in the name of Shri Shinde of M/s Niraj Gas Agency, who is brother-in-law, and according to P, Chief Election Campaigner, of R1. At the said press conference, N1 distributed pamphlets titled as मांग जालीचा तेलगी, ढोंगी लक्ष्मण ठोबपटे in which N1 made several statements (paras 18(a) to (g) of the petition) of facts which are false and which he believed to be false or did not believe to be true, relating to personal character of P. N1 also distributed to press reporters present, several copies of caste certificate, showing caste of P as Holar (SC-11) bearing serial No. 733/1995, dated 27-3-1995, allegedly issued by Tahsildar and Executive Magistrate, Solapur (North).

On 6-4-2006, N1 published another pamphlet titled 'बाप दाखव, नाही तर श्राद कर' containing same aspersions as in the pamphlet distributed at the press conference on the earlier day. This pamphlet displayed photographs of Sarvashree Balasaheb Thackeray (N2) Chief of Shiv Sena, Gopinath Mundhe, President of Maharashtra BJP Unit, Eknath Awhad self proclaimed prominent leader of that party and Dadasaheb Kshirsagar (N2) self proclaimed National President of Bahujan Majoor Party. During 5-4-2004 to 17-4-2004, nearly 35,000 copies of these pamphlets were distributed at various places within the constituency.

On 13-4-2004, a public meeting, as a part of election campaign of R1, was held at Naikwadi Nagar, Osmanabad between 6.00 p.m. to 8.00 p.m. R1 was present on the dais. During his speech, N2 made a statement to following effect;

“ He (P) obtained a false certificate of being Matang caste, though he is not Matang by caste and contested election, got entry/berth in the Government i. e. Ministry. This is what is his honesty.”

R1 never objected to or dissociated herself with any of these statements by any mode. According to P, statements by all the makers are false, which they believe to be false or do not believe to be true and were related to personal conduct and character of P and were circulated to prejudice prospects of P's election and the election result was materially affected thereby.

To sum up, from the contentions of R1 in the written statement, it can be said that all averments regarding alleged corrupt practice by N1 (by publication and distribution of pamphlet and copy of caste certificate at the press conference dated 5-4-2004 and on 6-4-2004) by Sarvashree Balasaheb Thackeray and Shivsharan Birajdar at the election campaign meeting dated 13-4-2004, are denied in toto. According to R1, conduct attributed to them does not amount to corrupt practices. None of these individuals was agent of R1 nor any of them committed the alleged acts with consent of R1. R1 also denied that election prospects of P or R1 were materially affected by any of the alleged corrupt practices.

04. Reply is filed by N2 at Exhibit 107 and it is contended that paragraph 26 of the petition is devoid of any material facts and particulars and ought to have been struck off at the threshold under the provisions of Code of Civil Procedure. The facts mentioned in the said paragraph are also incorrect and false. It is denied that N2 made a statement of fact, by referring to alleged false certificate (Exh. G) and pamphlet (Exh. F). Although editor of newspaper "Samna", he is not responsible for day-to-day reporting in the issue published from Aurangabad. (Sambhaji Nagar). The Executive Editor is responsible for the news items published in the said newspaper. Correctness of the reporting in Samna dated 14-4-2004 is denied. It is also denied that N2 uttered the words stated in the said paragraph 26 of the petition, at the said meeting.

Witnesses Yuvraj Shinde and Dilip Telang, who deposed against N2, are got up witnesses and have deposed false on oath.

It is added that, during the said meeting, N2 criticised his political opponents/political leaders and their socio-economic philosophy. He criticised their philosophy, their antecedents and character as a public man, which he is entitled to do during election campaign. It is added that, in the heat of election, it is permissible for competing parties

and candidates to make statements in relation to public characters of their opponents and even if (assuming without admitting) some of the statements are false, those would not amount to corrupt practice.

N2, therefore, has prayed for recalling the notice issued to him.

05. Noticee No.1, by application (Exh. 108) prayed for dropping the proceedings initiated against him. Only when the said application was rejected by a speaking order on 27-9-2007, he has filed his say in response to notice at Exh. 110.

All the allegations in the petition, as well as witnesses of P, are denied in toto as false and without substance. He has also denied any affiliation with any of the candidates contesting the subject election. It is claimed that, noticee neither belongs to any political party generally, nor to political parties contesting the election in Osmanabad Constituency particularly. He is a social worker having belief in post modern progressive ideology propounded by Bharat Ratna Dr. Babasaheb Ambedkar and would adhere to the same till his last breath. Bahujaan Majoor Party is established with this ideological background for social justice, equitable distribution of sources and civil liberty. The said organisation has no affiliation with any political party and it does not believe in any political activities, since it has its focal concern to upliftment of downtrodden. Allegations of holding press conference and distribution of any material in the form of pamphlet or any certificate, are denied in toto, as false and untrue. The document (Exh. E) which bears signature of N1, was only for the purpose of making a public at large, aware of such discrepancy as to the caste of P. The allegations regarding distribution of caste certificates are denied as false and untrue. N2 believes that he has every right to generate public awareness, if any kind of discrepancy is noticed and is required to be pointed out in the interest of community generally, and the downtrodden specifically and, therefore, such endeavour cannot be termed as "corrupt practice" as contemplated by RP Act. N1, therefore, prays that the notice may be recalled.

06. Even after taking into consideration the contentions raised by the two noticees, I believe; the issues framed and which survive for adjudication, after couple of issues having been answered by the Earlier Order, are not required to be added by new issues. The issues now to be considered are, therefore, as under:

ISSUES

(1) Does petitioner prove that Bahujaan Majoor Party, of which Krushna alias Srikrishna alias Dadasaheb Kshirsagar is National President, had openly and fully supported Respondent No. 1, without fielding any candidate of the said party in the subject election?

(2) Does petitioner prove that any corrupt practice within the purview of Section 123 (4) of the R.P. Act, was

committed at the subject election by Respondent No.1, or her election agent or by any other person:—

(a) by Dadasaheb Kshirsagar, by holding a press conference on 5-4-2004 at 8.30 p.m. at room Nos. 105 and 106 of Hotel Samarth, Osmanabad and distributing a pamphlet captioned “मांग जातीचा तेलगी, ढोंगी लक्ष्मण ढोबड” and xerox copies of a caste certificate showing caste of the petitioner as Holar (SC-11), thus making false statements in relation to personal character and conduct of the petitioner (as containing in paragraphs 18 (a) to (g) of the petition) calculated to prejudice the election prospects of the petitioner?

(b) by Dadasaheb Kshirsagar, by publishing another pamphlet captioned “बाप दाखव नाही तर श्राद्धकर” on 6-4-2004, containing false statements same as in earlier pamphlet-para 18(a) to (g) of the petition, in relation to personal character or conduct of the petitioner calculated to prejudice election prospects of the petitioner?

(c) by workers of Bharatiya Janta Party and Shiv Sena distributing these pamphlets between 6-4-2004 to 17-4-2004 at various places?

(d) by Shiv Sena Chief Shri Balasaheb Thakre, by making a speech in the public meeting (election campaign) held on 13-4-2004 between 6.00 p.m. to 8.30 p.m. at Naikwadi Nagar, Osmanabad and during the speech, making a false statement as reproduced in paragraph 26 of the petition, relating to personal character and conduct of the petitioner, calculated to prejudice the petitioner's election prospects?

(3) Does petitioner prove that the alleged false statements against personal character and conduct of the petitioner were made by Sarvashree Dadasaheb Kshirsagar, Balasaheb Thakre [and Shivsharan Birajdar] with the consent of Respondent No. 1, or her election agent?

(4) Does petitioner prove that Sarvashree Kshirsagar, Thakre [and Birajdar] indulged into alleged corrupt practice in the interest of returned candidate (Respondent No.1) and that the result of the election, insofar as it concerns Respondent No.1, has been materially affected, thereby?

(6) Is petitioner entitled to a declaration regarding election of Respondent No.1 at the subject election, being null and void?

(7) Is petitioner entitled to be declared as a candidate duly elected at the subject election?

(8) What order?

At the cost of repetition, it may be said that, I have already answered issue Nos. 2(e) and 5 in the negative, for the reasons discussed in Earlier Order. Issues No. 3 and 4 are reproduced as originally drafted, but clearly indicating that, I am not considering those issues, so far as actions of the then MLA Shri Shivsharan Birajdar is concerned and,

therefore, while reproducing the issues, his name is bracketed.

It is contended by noticee No.2 in his say that the petition does not contain concise statements of material facts. However, this issue was raised by R1 and it has been squarely dealt with by reasons recorded in paragraph 13 of the Earlier Order. The said discussion needs no repetition, although the same contention is again raised by N2.

7. Oral evidence led by P comprises of 16 witnesses, including P himself, who is examined at Exhibit 27.

The alleged corrupt practices can be grouped into three parts. The first part is alleged press conference held by N1 wherein, R1 was present and first pamphlet captioned “मांग जातीचा तेलगी” together with a caste certificate showing P to be belonging to Holar caste, was distributed. The second part is the allegation that, from 6-4-2004 onwards, supporters of R1 and workers of Shiv Sena distributed to the voters in the constituency, both the pamphlets captioned “मांग जातीचा तेलगी” and “बाप दाखव नाहीतर श्राद्धकर”. The third part is the election campaign meeting of R1, dated 13-4-2004 and the speech delivered by N2, at the said meeting. Remaining 15 witnesses also can conveniently be grouped, according to three parts of alleged corrupt practices.

PW-3 Sanjay Patil (Exh.54) is a journalist attached to daily “Jagrut Jana Pravast” published from Solapur. PW-4 Vitthal Patil (Exh.57) is a representative of weekly “Maharashtra, Kaal, Aaj, Udaya” published from Aurangabad. Both these witnesses claimed to have attended the press conference, allegedly held by N1, on 5-4-2004 at room Nos.106/107 of Hotel Samarth at Osmanabad. They are, therefore, witnesses to the said press conference and distribution of first pamphlet “मांग जातीचा तेलगी” together with copies of caste certificates, showing P to be belonging to Holar caste, at the said press conference. PW-8 Mahesh Patil (Exh.63) is the manager of said Hotel Samarth of Osmanabad. He is examined to prove that room Nos.106/107 of the said hotel, were booked for Shri Shinde, proprietor of Neeraj Gas Agency for the period from 26-3-2004 to 20-4-2004. It is the contention of P that Shri Shinde is related to R1 (brother-in-law, husband of sister) and was election agent of R1.

PW-2 Shrikant Kasbe (Exh.52), PW-5 Bhausaheb Kasbe (Exh.59) and PW-6 Ashok Jadhav (Exh.60) all are workers of P, who participated in the election campaign for P. All of them claim that they had witnessed Shiv Sena workers distributing both the pamphlets on and after 6-4-2004. All of them claimed to have received the pamphlets on 8th, 9th and 10th April, 2004 and passed those to P. Even PW-4 Vitthal Patil claims to have received second pamphlet on “बाप दाखव नाहीतर श्राद्धकर” 6-4-2004 and to have confronted P with the same for his reaction. PW-14

32) GI/09-2

Devanand Rochkari (Exh.74) is an important witness on this aspect. He claims that, at the material time he was worker of Shiv Sena and was entrusted the responsibility of distributing the two pamphlets, by RI. PW-5 Bhausaheb claims to have received the pamphlets from PW-14.

There is a set of witnesses who disclose the reaction of P to the distribution of pamphlets and copies of caste certificates showing P to be of Holar caste. PW-9 Dipak Wajale (Exh.65) was then Naib Tahsildar, North Solapur, P had tendered an application to his office on 12-4-2004, requesting for information about entry at serial No.735/1995, in the register pertaining to issuance of caste certificates and his office had replied vide Exhibit 45 that, the said entry was not pertaining to P, but about one Sangeeta Pandurang Chambhar. PW-11 Dr. Sheshrao Savargaonkar (Exh.68), the then Sub Divisional Officer, Osmanabad and functioning as Assistant Returning Officer, has deposed about P complaining to the Collector Osmanabad/Returning Officer, about this propaganda, based on caste certificate showing P to be Holar. The Collector, Osmanabad seems to have ascertained from Collector, Solapur that no such certificate was issued by the offices of Sub Divisional Officer, Pandharpur and Sub Divisional Officer, Solapur. The communication informs that no such certificate was issued by Tahsildar, South Solapur. Hence, Dr. Savargaonkar was recalled, after all the witnesses, to say that "Tahsildar, South Solapur" in the communication from Collector, Solapur, is a typographical error. PW-10 Chandrakant Dilpak (Exh.66) was the PSI attached to City Police Station, Osmanabad, in the year 2005. He was examined to establish the fact that P had filed a complaint with that police station for offences punishable under Sections 420, 465, 468, 469, 470, 471, 499 and 500 read with Section 34 of IPC against as many as nine accused persons, including RI and NI. Evidence of PW-7 Bhimrao Hajare (Exh.62), Senior Clerk, attached to the court of Chief Judicial Magistrate, Osmanabad, indicates that charge-sheet filed after investigation into the said complaint, is registered as Criminal Case No.367 of 2004, by the office of Chief Judicial Magistrate, Osmanabad. PW-16 Bhikaji Sankpal (Exh.72) was Tahsildar, North Solapur, from March 1993 to May 1995 and he is examined to say that the certificate, copies of which were being distributed, does not bear his signature. Remaining three witnesses are pertaining to election campaign meeting of RI, dated 13-4-2004 at Osmanabad, near Pushpak Mangal Karyalaya. PW-13 Yuvraj Shinde (Exh. 73) and PW-15 Dilip Telang (Exh. 75) are the witnesses, who claimed to have attended that meeting. PW-12 Gahininath Ingle (Exh.71) was Police Inspector, Osmanabad Rural Police Station, who had granted permission for holding the meeting.

8. In all ten witnesses are examined on behalf of Respondent No.1. For the sake of convenience, we are referring to them as Defence Witness (D. W.) Respondent No.1 herself deposed as DW-5 at Exh.91. Her Personal

Assistant Sanjay Malpani is examined as DW-7 at Exh.94. Deposition of Sanjay Malpani, we cannot avoid temptation of saying, to be really of very little impact on the case, at least so far as chief examination is concerned. He was also election agent of Respondent No.1, yet he says that he was not in charge of complete election campaign, but he, was expected to keep the accounts of daily expenditure, nominate counting and polling agents.

All remaining witnesses appear to have been examined for only one theme that RI was not present at the press conference convened by NI on 5-4-2004 at Hotel Samarth in Room Nos. 106/107. DW-1 Lahu Aglawe (Exh.84) and DW-2 Suhas Deshmukh (Exh.85) deposed about RI having conducted her election campaign, meetings at villages Aglawe Bavi and pangri respectively, on 5-4-2004 between 5.30 p.m. to 7.00 p.m. and 7.30 p.m. to 8.30 p.m. DW-3 Jaisingh Deshmukh (Exh.86) has attended above two meetings and also the third meeting at Pangaon between 9.00 p.m. to 10.00 p.m., of 5.4.2004. DW-10 Rajendra Raut (Exh.100) is also examined to say that RI conducted above three meetings on 5-4-2004 at three villages, one after another. In fact, Rajendra Raut has also produced newspaper clippings of "Sakal" and daily "Sanchar", in order to bring on record the reports of the said meetings. DW-8 Haribhau Khade (Exh.97) and DW-9 Suresh Jakkawad (Exh.98) were the PSIs of Vairag Police Station and Pangri Police Station, at the relevant time. They had granted permission for meetings to be held at Pangaon and Bavi between 8.30 p.m. to 10.00 p.m. and 6.00 p.m. to 8.30 p.m. respectively. These are the permissions for third and first meetings held by RI on 5-4-2004. DW-4 Dattatraya Salunke (Exh.90) had attended the meeting at Bavi.

DW-6 Santosh Hambhire (Exh.92) is a witness on a different point. He is executive editor of daily "Sangharsha Samjwadacha". He is examined to further strengthen absence of RI at press conference on 5-4-2004. He claims to have attended the conference and deposes that it was wholly affair of Bahujan Majoor Party of NI and that no workers of Shiv Sena were present. He had also attended public meeting held on 13-4-2004, wherein N2 was the main speaker. Eventually, by examination of this witness, RI impliedly accepts the fact of press conference convened by NI, on 5-4-2004.

After service of notices, as required by proviso (a) to clause (b) of sub section (1) of Section 99 of the RP Act, both the noticees have filed their say and the witnesses already examined by the court were recalled for cross-examination by respective noticees. Accordingly, PW-2 Shrikant Kasbe (Exh.52), PW-3 Sanjay Patole (Exh.54), PW-4 Vitthal Patil (Exh.57), were cross-examined by NI. PW-2 Shrikant Kasbe, PW-13 Yuvraj Shinde (Exh.73) and PW-15 Dilip Telang (Exh.75) were cross-examined on behalf of N2. Only those witnesses were offered for cross-examination, who were desired to be cross-examined by the respective noticees.

9. During his submissions for P, learned Counsel Shri Kanetkar has placed reliance upon Section 123 (4) of the RP Act, for the purpose of defining "corrupt practices" committed, and so faras persons who committed corrupt practices, thereby inviting declaration of election of R-1 to be void, he has relied upon Section 100 (1) (b) and 100 (1) (d) (ii). According to him, there was publication by N1 at the press conference dated 5-4-2004, of pamphlet (Exh. 55) i.e. "मंग जातीचा तेलंगी" and caste certificate (Exh. 56), showing P to be Holar. There was also publication by distribution of pamphlet (Exh. 58) on 6-4-2004 and thereafter by workers, of BJP-Shiv Sena alliance. And on third occasion, there was publication by speech at the meeting dated 13-4-2004, especially by N-2, referring to caste claim of P. All these statements imputing P to be belonging to Holar caste and yet claiming to be of Mang community, were projected to the voters as deception practiced by P upon the voters, through N-1, workers of the party and N2 who would fall within the clutches of term "any other person" as contained in clause (b) and term "by an agent other than his election agent" as contained in clause (d) (ii) of sub-section (1) of Section 100 of the RP Act. It was submitted that the persons, who received the pamphlets distributed and who attended the meeting wherein N2 delivered a speech, are examined and their evidence proves the publication and thus commission of corrupt practice as defined by sub-section (4) of Section 123 of the RP Act, by N1 and N2.

It was submitted that deposition of P, as contained in paragraphs 11 to 14, has gone unchallenged inspite of his elaborate cross examination on behalf of R1. Likewise, so faras averments in paragraphs 22 to 24 of the petition pertaining to distribution of pamphlet (Exh. 58) बाप दाखव नाहीतर श्राध कर are concerned, denial of those, by paragraph 14 of the written statement is evasive. Therefore, according to learned counsel for P, those averments are required to be held impliedly admitted and thus proved, in view of Order VIII Rules 4 and 5 of the Code of Civil Procedure, 1908.

According to him, N1, in spite of having filed reply at Exh. 110 to the notice, has not denied distribution of pamphlet and copies of caste certificate and hence such distribution of pamphlet and caste certificate, as also publication of contents therein, needs to be held proved. N2, in spite of having filed his say at Exh. 107, has not offered any explanation to his photograph appearing on the second pamphlet (Exh. 58). Therefore, learned counsel desired this court to believe that the pamphlet was distributed and published with the consent of those, whose photographs were printed thereon.

According to the learned counsel, consent of R1 is a matter of inference. R1 herself has offered no explanation regarding photographs of leaders of Shiv Sena—BJP appearing on the second pamphlet. There is no protest

regarding booking of rooms in the name of Shri Shinde, with Hotel Samarth. Shri Subhash Shinde was recited as witness No. 8 in the witness list filed at Exh. 80, by R1, who was discharged without examination. Learned counsel for P, therefore, urged to draw an adverse inference that the rooms were booked by Shri Subhash Shinde, wherein the press conference was held. Because R1 has admitted cordial family relations with Subhash Shinde, it was submitted that the rooms were booked by Shri Subhash Shinde and conference in those rooms was held with consent of R1.

P has specifically deposed that the statements in these pamphlets and caste certificates are false. He also had correspondence with revenue authorities. He has also taken appropriate legal steps, by filing prosecution against R1, N1 and others, as also by making complaint to competent authority (State Election Commission). As against this, denials on the part of R1, as contained in paragraphs 17 and 18 of the Written Statement are slipshod and evasive. The evasive denials are required to be treated as implied admissions and, therefore, it is not necessary for P to do anything more, in order to prove that the statements in the pamphlets and caste certificates, were false. Consequently, it is for R1 and the two noticees to prove the statements to be true/correct. P, by production of documents pertaining to his caste (Exhs. 28 to 32) showing his caste to be Hindu (Mang), has brought on record sufficient material to show that caste certificate (Exh. 56) is false. N1, during cross examination of P, did not suggest the caste certificate (Exh. 56) to be true and N2 tried to stick to a position, as if Exh. 56 is true. That the P is "जात बदलू" i.e. "changer of his caste" is an imputation against personal character of P. According to Advocate Shri Kanetkar, P has discharged his burden of proof, by material on record and established that the imputations in the pamphlets and the contents in the caste certificate pertaining to P, are false and by virtue of Section 106 of the Evidence Act, it is for N1, N2 and R1 to prove caste certificate (Exh. 56) to be true.

In order to demonstrate that the statements were calculated to prejudice the election prospects of P, statistics given by P were relied upon by Advocate Shri Kanetkar. According to him, as per the calculations of P, in the constituency of nearly 11,00,000 voters, there are 13,200 voters from Matang (Mang) community and P has lost with a margin of only 1,649 votes. This will demonstrate that the imputations were calculated to prejudice the election prospects of P and improve the prospects of R1 at the subject election, by causing people from Mang community to look at P, as unreliable. Because R1 during her cross examination in para 12, refused to comment whether the contents in the pamphlet are true or untrue, according to learned counsel; she must be believing those to be untrue.

For the purpose of speech delivered by N-2 on 13-4-2004, Learned Counsel for P has relied upon Exh. 47,

the clippings from daily "Samna" dated 14-4-2004. According to him, Samna is a newspaper of the party of Respondent No. 1, of which N2 is Editor and, therefore, reporting therein about N2 having made certain statement, cannot be brushed aside lightly. Regarding averments in the reply filed by N2 at Exh. 107, it was submitted that if N2 was not responsible for correctness of reporting in Samna, then person responsible ought to have been examined to show that it was incorrect reporting, if it is to be claimed either by R1 or N2 that N2 did not make any statement, raising imputations against personal character of P. According to learned counsel for P, even if PWs 13 and 15 are disbelieved, because of their version discrepant with the photographs produced by photographer Shri Kore-examined as witness of N2, yet P has brought enough material on record to prove that N2 during his speech made imputations against P, of his having made a false caste claim and thus against personal character of P. All the while during his arguments, learned counsel Shri Kanetkar emphatically submitted that R1 has not come with any evidence that she dissociated herself from publication of imputations either by N1 or N2.

10. Advocate Shri Thigle, on behalf of N1, submitted that P has failed to prove political status of N1 or that N1 belongs to any political party. According to N1, he is a member of social organization i.e. his party "Bahujan Majoor Paksha", having no affiliation with any political party or any of the contestants in the subject election. The second pamphlet (Exh. 58) "बाप दाखव नाही तर श्राधकर" is by Navriath Upalekar and N1 has no concern with the same. Yet, Navnath is not impleaded as an accused in the criminal case filed by P.

Advocate Shri Thigle urged that "consent" of candidate or his election agent is required to be proved and the same must be express and not implied. According to learned counsel, P has failed on two counts. He has not proved political status of N1 and he has also not proved what is truth and, therefore, it cannot be ascertained as to what is untrue. According to Shri Thigle, because of the certificate of P belonging to Holar community, there is ambiguity about caste of P and unless it is verified that caste of P is Matang, it cannot be said that N1 made a false statement about P belonging to Holar caste.

According to Advocate Shri Thigle, in view of above two lacunae, P has failed to prove that N1 has acted in such a manner that his moves were reasonably calculated to prejudice the election prospects of P. Journalists examined on behalf of P, according to Advocate Shri Thigle, are got-up witnesses. In order to prove that the election prospects of P were materially affected, P ought to have proved that because of publication of the pamphlets, people from Mang community did not vote in favour of P. Advocate Shri Thigle, therefore, urged for discharge of notice against his client, by claiming that his client has placed before public, the discrepancy about the caste of P

and, therefore, has committed no corrupt practice as under Section 123 (4) of the RP Act.

11. During his submissions for N2, Advocate Shri B.D. Joshi submitted that N2 is not bound to answer allegations regarding reports in Samna. He is neither a party nor bound to file written statement/ say and hence, rules of pleadings, such as, proof by non traverse, are not applicable. N2 is expected only to explain corrupt practice alleged against him, by pws 13 and 15. According to Advocate Shri Joshi, pws 13 and 15 are interested witnesses, being supporters of P. Cross examination of these witnesses demonstrates that they remember only allegations against N2 and nothing else. The contents in press reports in Samna are not proved by examinations of reporters and, therefore, P has miserably failed to prove what happened in the meeting dated 13-4-2004.

Unless validity of the caste certificate showing P to be Mang, is brought on record or invalidation of caste certificate showing him as Holar is brought on record, it cannot be said that P has proved second certificate to be false. Saying that the caste claim of P is false, is not an imputation against personal character. There is no proof that election prospects were materially affected by distribution of copies of pamphlets or caste certificates. Thus, according to Advocate Shri Joshi, speech by N2 and more particularly the allegation that N2 made imputations against P, is a false story. Advocate Shri Joshi, therefore, prayed for discharge of notice against N2.

12. While arguing for R1, Advocate Shri Joshi propounded that, ingredients of Section 123 (4) of the RP Act are not at all proved. N2, a leader of political party, cannot be treated as an agent of a candidate. The standard of proof required is that of a criminal trial and onus of proof never shifts, but P has to stand on his own. According to Shri Joshi, newspaper reports are not admissible in evidence and copies of pamphlets being secondary evidence, also cannot be read. To support interested witnesses, according to Advocate Shri Joshi, contemporaneous documents are not brought on record (Advocate Shri Joshi was referring to video recording of election meeting, by election commission, so far as allegations against N2 are concerned).

According to Advocate Shri Joshi, pleadings of P and his evidence are contrary to each other. There is no evidence to prove coalition between Shiv Sena—Bahujan Majoor Paksha, or Shinde being Chief election campaigner, as pleaded in paragraph 15 of the election petition. There is no pleading that N-1 was acting with consent of R1, or her election agent. It is also not pleaded that R1 was present for press conference. There is no plea that R1 or other persons believed the statements in the pamphlets to be untrue. According to Advocate Shri Joshi, whether the certificate is bogus certificate or not, can be decided only by competent scrutiny committee and P has not claimed

that his caste claim, of belonging to Mang community is verified by the Scrutiny Committee. Advocate Shri Joshi commented pamphlet (Exh. 58) to be bogus. According to him, consent of his client cannot be inferred because of photograph. According to Shri Joshi, it was impossible to take out 35,000 copies of two documents over-night. Moreover, according to Advocate Shri Joshi, printing of photograph with the consent of N2 must be disbelieved, because that would amount to N2 creating evidence against himself. He pointed out that R6 is a candidate of party of N1 and he contested the subject election as "independent", because party of N1 is not registered as political party.

Advocate Shri Joshi submitted that before relying upon the reports in the newspaper, the reporting journalists ought to have been examined witnesses who talked about meeting dated 13-4-2004, according to Advocate Shri Joshi, are unreliable and the document i.e. caste certificate allegedly shown by N2 at the meeting was, in any case, a publication by N1 and not by N2. Original pamphlets and caste certificate are not brought on record and before relying upon xerox copies, even N1 is not called upon by a notice, to produce the originals. If there are two caste certificates pertaining to P, N2 had a right to criticise the same and that would not amount to an assault on personal character.

Advocate Shri Joshi criticised each witness of P as unreliable, independently, on the basis of character of the witness and nature of his evidence.

13. Although some of the provisions of the Code of Civil Procedure, as also Evidence Act, are relied upon by Shri Kanetkar, learned counsel for P, we may refer to those during the course of discussion of reasons as and when necessary. The provisions which are required to be relied upon as the basis of the petition, are the provisions from the R.P. Act and we may usefully reproduce those hereinbelow:

Section 123. "Corrupt Practices". Following shall be deemed to be corrupt practices for the purpose of this Act.

(1) to (3).****

(4) The publication by a candidate or his agent or by any other person with the consent of a candidate or his election agent, of any statement of fact, which is false and which he either believes to be false or does not believe to be true, in relation to personal character or conduct of any candidate, or in relation to candidature or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

Section 100. Ground for declaring election to be void; Subject to the provisions of sub-section (2), if the High Court is of opinion—

(a)****

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of returned candidate, or his election agent, or

(c)****

(d) that the result of the election, insofar as it concerns a returned candidate, has been materially affected—

(i)****

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii)****

(iv)****

the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied—

(a)****

(b)****

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d)****

then the High Court may decide that the election of the returned candidate is not void.

Taking into consideration that P relies upon sub-section (4) of Section 123 of the RP Act for defining 'corrupt practice' and the corrupt practice is alleged to have been committed not only by R1 but by other persons also, P is required to prove following ingredients, in order to seek a declaration of election of R1 to be void.

(i) publication by N1 and N2.

(ii) with the consent of R1 (or her election agent).

(iii) the statement of fact in relation to personal character or conduct of P.

(iv) the statement is false.

(v) the maker either believes it to be false or does not believe it to be true, and

(vi) the statement was reasonably calculated to prejudice prospects of P's election.

In the matter at hands, it is the contention of P that N1 published and distributed copies of pamphlet (Exh. 55) and a caste certificate showing P to be of Holar caste (Exh. 56). The workers of the party of R1 distributed copies of two pamphlets (Exhs. 55 and 58). N2, during his speech,

relied upon caste certificate (Exh. 56) and accused P, of making false caste claim of being Mang. According to P, statement that he belongs to Holar community, as contained either in the pamphlets or the caste certificate, or the speech of N2, is false and the makers believed it to be false or did not believe it to be true. And according to P, this was a calculated move to prejudicially affect his election prospects.

It is by virtue of Section 100 (1) (b) and 100 (1) (d) (ii) of the RP Act, it is claimed by P that the corrupt practice, even if committed by N1 or N2, invites declaration of election of R1, to be void. Clause (b) of Section 100 (1) obliges P to prove :—

- (i) 'corrupt practice' committed by N1 or N2.
- (ii) with the consent of R1 (or her election agent).

It is the claim of P that N1 and N2 indulged into publication of false statement pertaining to personal character of P, with consent of R1.

Clause (d) (ii) would also invite a declaration of election of R1, to be void, if :—

- (i) result of the election is materially affected,
- (ii) by corrupt practice committed in the interest of R1, and
- (iii) by an agent other than her election agent.

In view of the peculiar nature of the averments, I am required to consider the election petition in three parts and existence of above ingredients is required to be proved by P for all three events viz.:

- (i) press conference dated 5-4-2004.
- (ii) distribution of copies of pamphlets, from 6-4-2004 onwards, and
- (iii) speech delivered by N2.

14. In order to establish that N1 held a press conference on 5-4-2004, wherein he distributed copies of pamphlet (Exh. 55) and caste certificate (Exh. 56), the event about which P himself has no personal knowledge but has learnt about the same from others, P has examined two witnesses, namely, PW-3 Sanjay Patole, a journalist attached to daily "Jagrut Jana Pravas" from Solapur and PW-4 Vitthal Patil, District Representative of weekly "Maharashtra, Kaal, Aaj, Udaya" published from Aurangabad. Both the witnesses claim that they attended the press conference that was convened by N1 on 5-4-2004 at Hotel Samarth of Osmanabad. Sanjay referred to venue as room No. 106 of the said hotel, whereas, according to PW-4 Vitthal, venue was room Nos. 106/107. Both of them claim that N1, Eknath Awhad and R1 were present. According to these witnesses, N1 spoke in the conference. He alleged that P belongs to Holar caste and saying so, he distributed copies of Exhibits 55 and 56. Both

these journalists, at the request of P, had forwarded to him, copies of documents vide communications Exhs. 43 and 41 respectively. Exh. 43 is dated 10-5-2004, whereas Exh. 41 bears no date. Although both witnesses claimed to have obtained reaction of P on these publications, witness Sanjay admits that he did not publish the same. Even Vitthal does not claim to have published the same.

P has produced on record, not only aforesaid two communications (Exhs. 43 and 41), but he has also produced similar communications dated 10-5-2004 from one Pravin Kolge of "Desh-satta" and Santosh Hambire. Executive Editor of daily "Sangharsha" at Exhibits 42 and 44 respectively. The task of P, of proving the fact that N1 held such press conference and distributed copies of Exhibits 55 and 56 at the said conference, was, to some extent, made light by R1, by examining journalist Santosh Hambire of daily Sangharsh, as Defence Witness No. 6 at Exh. 92. However, according to DW-6 Santosh, who was invited by one Bajrang Tate for the press conference, the said conference was convened by N1 and apart from N1, one Milind Awhad and Sidram Dhoble were present at the conference. According to Santosh Hambire, press conference was also covered by one Rahul Kulkarni, of Zee T.V. The purpose of examining the journalist, who furnished copies of the documents distributed by N1 to P, can be judged from the evidence of DW-6 Santosh. According to Santosh, conference was attended by N1, Milind Awhad and Sidram Dhoble. Santosh Hambire was specific that neither R1 nor any of the workers of Shiv Sena was present at the press conference. With the examination of Santosh Hambire by R1, I do not think that it is open either for R1 or N1 to deny that N1 held press conference and distributed copies of Exhs. 55 and 56 at the said press conference.

On this aspect, we may usefully refer to some of the contents of the reply filed by N1 at Exhibit 110 in response to notice served on him. After denying in paragraph 4, the allegations of convening the press conference or distribution of any material at the same time, as false and untrue, N1 says:

"It is emphatically stated that the documents at Exh. F only to the petition (which is now Exh. 55) bears signature of present noticee, however, it was only for the purpose of making aware the public at large of such discrepancy as to the caste of present election petitioner. Being head of social organization concerned with the aforementioned objects, it was incumbent on the part of noticee to bring this discrepancy to the notice of public at large."

In paragraph 6, N1 says:

".....the noticee has every right to generate public awareness, if any kind of discrepancy is noticed and is required to be pointed out in the

interest of community generally and the downtrodden specifically, for the welfare of which the present noticee is duty bound."

Although N1 denies to have convened the press conference and having distributed copies of Exhs. 55 and 56 at the said conference, excerpts from the reply reproduced hereinabove, are certainly admissions by N1 that he has published and distributed copies of Exh. 55.

Presence of R1 at the press conference is a disputed question of fact. R1 has examined almost all the witnesses to prove her absence at the said press conference, by trying to prove her presence elsewhere. DW-1 Lahu, DW-2 Suhas, DW-3 Jaising, DW-8 Haribhau Khade and DW-10 Rajendra Raut, all are examined to say that on 5-4-2004 evening, R1 was on election campaign tour and she held meetings at villages Bawi, Pangri and Pangaon in that order between 6.00 p.m. to 10.00 p.m. on 5-4-2004. Exh. 89 is the permission obtained by Keshavrao Ghogre for the meeting at Pangaon between 8.30 p.m. to 10.00 p.m. from Vairag Police Station. Although permission itself does not refer to meeting by R1, DW-8 Haribhau Khade, PSI Pangri Police Station, who was deposing from the original record from the police station brought by him, stated that the application contains names of R1, Rajabhau Raut, Satish Argade and Keshav Ghogre, as the persons likely to hold the meeting. Witness Khade had shown willingness to produce the original record, but neither Advocates invited the document on record and the learned counsel for P was satisfied with the admission by PSI that he had not verified from the inward and outward register, the receipt of the application and despatch of permission. Advocate for P did not challenge the witness, by showing absence of inward/outward numbers on the application and permission. Similar is the nature of evidence of PW-9 Suresh Jakkawad. At the material time, he was not attached to Pangri Police Station, but he deposed from the record that the application of Keshav Ghogre was received by ASI Pawar on 3-4-2004, which prayed for permission for holding election campaign meeting by R1 at Bawi, on 5-4-2004 between 6.00 p.m. to 8.30 p.m.

Last but not the least. It must be pointed out that in the petition, it is not specifically pleaded that the press conference dated 5-4-2004, allegedly convened by N1, was attended by R1 or any of Shiv Sena workers (Petition Paragraphs 15, 16 and 17). In these paragraphs, it is only pleaded that Bahujan Majoor Paksha of N1 had declared support to Shiv Sena candidate and that meeting was held in room nos. 106/107 of Hotel Samarth, which were booked in the name of one Shri Shinde of Niraj Gas agency, who is brother-in law of R1, for the purpose of claiming that the press conference was convened, with the consent or in connivance with R1. That, R1 was present at the press conference, is a case tried to be made out without pleading. It can be seen that, by evidence of defence witnesses

referred to hereinabove, such a contention is totally falsified.

Whether newspaper reports, clippings of which are filed and relied upon by P, can be read in evidence, is an issue raised by learned counsel for R1 and N2. I shall deal with the issue, in case I rely upon the newspaper reports for drawing any inference against R1 or N2. However, P himself having filed these press reports on record, he can not run away from the same. At Exh. 48, P has filed clippings from the press reports of Osmanabad Times dated 7-4-2004, daily Sangharsh dated 7-4-2004, Samna dated 8-4-2004, Sakal (Latur-Osmanabad edition) dated 7-4-2004 and Punnya-nagari dated 7-4-2004. Although these press reports speak about the press conference, none of them refers to presence of R1 at the said press conference and none of those also refers to the venue to be room Nos. 106/107 of Hotel Samarth, although some of the reports refer to the press conference at Hotel Samarth. In view of evidence of the DW-6 Santosh Hambire, who attended the press conference, DW-1 Lahu, DW-2 Suhas, DW-3 Jaisingh and DW-10 Rajendra Raut, who attended election campaign meeting with R1 at Bawi, Pangri and Pangaon, one after another between 6.00 p.m. to 10.00 p.m. and absence of pleadings regarding presence of R1 at the said conference, so also absence of reference to her presence in the press reports relied upon by P, it is not possible to believe that R1 was present at the said press conference, although, in view of partial admission by N1 quoted hereinabove, the fact of press conference being held by N1 will have to be believed. N1 has not entered the witness box to deny that, he had held such press conference.

P has relied upon following circumstances, in order to claim that the action of N1, of holding press conference, distributing copies of Exhs. 55 and 56 at the said conference, was the consent of, or at the behest of R1.

- (i) Presence of R1 at the said press conference.
- (ii) Conference being held in room Nos. 106/107 of Hotel Samarth which were booked in the name of Shri Shinde of Neeraj Gas Agency and election agent of R1.
- (iii) Bahujan Majoor Paksha (BMP) having declared its support to Shiv Sena candidate at the subject election.

So far as first circumstance regarding presence of R1 at the said press conference is concerned, it must be said that the averment to that effect on the part of P is sufficiently disproved for the reasons discussed hereinabove, absence of such pleading in the petition being the prime reason. On that count, we may also refer to Exh. 70. This, according to P, is a complaint lodged by him to the Collector, Osmanabad (presumably, in his capacity as election officer), on 20-4-2004. This vernacular communication states that

Advocate Eknath Awhad, N1 and Milind Awhad have procured a bogus caste certificate, purporting to be of P and have given wide publicity to the same, by holding press conference. Hence, he has prayed for legal action against these three individuals. Absence of any reference to R1 or her party in this complaint dated 20-4-2004, after a lapse of fortnight since the press conference; should confirm that till then P neither believed about presence of R1 at the said press conference, nor he believed the press conference to be at her behest. It was for the first time in his complaint lodged to Osmanabad City Police Station on 24-5-2004, P alleged R1 of being a party to the said press conference and publication of the material causing character assassination of P. We may record here itself that in the complaint dated 20-4-2004 to the Collector or even in the complaint dated 24-5-2004 to the Police, although there is a reference to the venue of the press conference as "Hotel Samarth", both the complaints do not specifically refer to room Nos. 106/107 of the said hotel to be the venue.

The second circumstance for deducing an inference of press conference held by N1 on 5-4-2004 at Hotel Samarth, either being with the consent or at the behest of R1 and for her benefit, is the claim of P that it was held at room nos. 106/107 of said hotel. These rooms were booked in favour of Shri Subhash Shinde, who runs Niraj Gas Agency and who is related to R1. In order to prove booking of those rooms in the name of Subhash Shinde, P has examined PW-8 Mahesh Patil. He is the manager of Hotel Samarth. According to his narration, hotel is owned by his elder brother Narsinha. Hotel maintains separate register for booking of marriage hall and rooms. In the register, they record name of the person for whom part of the hotel is booked. He has produced at Exh. 64, xerox copy of the original register, which he had brought for use while rendering his evidence. The relevant entry is in the handwriting of witness Mahesh and it showed that room Nos. 106/107 were booked for Shri Shinde of Niraj Gas Agency for the period 26-3-2004 to 20-4-2004. R1, in her cross examination, has admitted that Shri Subhash Shinde is related to her. He is husband of younger sister of R1. Niraj is name of son of R1. Niraj Gas Agency is her (R1) proprietary concern and Shri Subhash Shinde runs it, presumably as an employee. R1 emphatically denied Shri Subhash Shinde being in-charge of her election campaign or her election agent. She also denied the suggestion that for the purpose of election campaign, relatives are given preference over other party workers, because relatives can be said to be more reliable and faithful.

Unfortunately, PW-8 Mahesh has not stood so firm as to establish that the said booking of room Nos. 106/107 can be said to have been proved beyond any doubts, for Shri Shinde and by any of his authorised agent. Mahesh has admitted in his cross examination that the hotel management writes name of the person for whom part of

the hotel is booked. This is done even as per the message given by the messenger which means that the person for whom part of the hotel is to be booked, is not required to do booking in person. Signature of the person, who requests for booking, is obtained on the register. In the present case, according to PW-8 Mahesh, entry bears signature of the person, who had come to book the room and the said person had signed it in his presence. However, witness Mahesh was not in a position to name the person, who had booked room nos. 106/107 for Shri Subhash Shinde, by referring to the entry and the signature. Thus, evidence of Mahesh cannot establish with firmness that messenger of Subhash Shinde only, had approached for such booking. We have already pointed out that neither press reports nor the complaints lodged by P either with the Collector or even with the police, make a reference that the press conference dated 5-4-2004 was held by N1 at room nos. 106/107 of Hotel Samarth and, therefore, it must be said that the press conference being held at room nos. 106/107 of Hotel Samarth, is a contention raised for the first time in the election petition, which was not so specifically raised when there was opportunity to raise the same on earlier occasions i.e. when P lodged complaints dated 20-4-2004 and 24-5-2004.

In fact, there is no evidence, except bare words of P, to say that Shri Subhash Shinde was heading the election campaign of R1. This averment is denied by R1. Learned counsel for P was critical because Subhash Shinde, although recited as witness in the list of witnesses filed by R1, did not enter the witness box and he prayed for drawing adverse inference. Had PW-8 Mahesh Patil stood firm and established with reasonable certainty, the booking of room nos. 106/107 in favour of Shri Subhash Shinde, omission on the part of Shri Shinde to enter the witness box could have had adverse impact on the case of R1. Unfortunately, evidence of PW-8 Mahesh leaves a possibility that even anybody else, dummy might have managed such an entry or even the booking. It was argued by learned counsel Shri Kanetkar for P that R1 has not appropriately reacted on this false entry by her relative. This is not a submission fully correct. R1 has stated that she had questioned Shri Shinde about it and Shri Shinde had denied to have booked any rooms. It must, therefore, be said that the evidence on record is incapable of proving with reasonable certainty that room nos. 106/107 were booked by Shri Subhash Shinde as head of election campaign of R1 and that the press conference dated 5-4-2004 was held in those rooms.

P has contended that BMP of N1 had declared its support to Shiv Sena candidate at the subject election. However, he was required to admit in his cross examination that amongst all the documents produced by him on record, there is no document indicating that BMP of N1 had declared its support to Shiv Sena candidate. In this context we may refer to clippings from newspaper Desh Satta

dated 7-4-2008 at Exh. 48. It reports that one Prakash Khandagale of Bahujan Mahasangh, who had filed nomination from Osmanabad Parliamentary constituency, had withdrawn his nomination and declared his full support to P, a candidate of INC and NCP. If party of N1 had declared full support to R1, a Shiv Sena candidate, there could have been some such declaration, because the fact of such support had to reach the voters and the declaration would have been reported in the press, as in the case of Prakash Khandagale. However, no such evidence is brought on record. On the contrary, P admits that Respondent Nos. 2,3,5 and 6, the other candidates in the fray, belong to Matang community and R-6 Navnath Upalekar had filed nomination as a candidate sponsored by BMP of N1. There is nothing on record to say that R6 had declared his support to R1 by any declaration to the voters, in spite of not having withdrawn his candidature within the time limit for withdrawal. On reference to his written statement at Exh. 21, R6 seems to be not supporting R1, when he states in paragraph 3 that Shiv Sena -Bharatiya Janta Party workers were distributing the pamphlets, although Exh. 58 prints his name as a publisher.

It was also urged that because the second pamphlet (Exh.58) bears photograph of N2 and Shri Gopinath Mundhe, the pamphlet is published with the consent of R1. We may question, in that case, if R1 had provided the photographs of leaders of her party to the publisher of the pamphlet, the pamphlet could have borne even her photograph. A judicial note is required to be taken that the press keeps in its custody, photographs of popular individuals, such as political leaders, players from different disciplines of sports, idols of the screen and it is not necessary every time to approach to such individual to have his/her photograph.

For all the reasons discussed hereinabove, it will have to be said that the P has not proved the circumstances with standard of proof required in an election petition, upon which he relies for the purpose of drawing an inference that the action of N1, of holding press conference on 5-4-2004 and distributing copies of Exhs. 55 and 56 (pamphlet and a caste certificate), was with the consent/connivance or at the behest of R1. Consent of returned candidate, or his/her election agent being the essential ingredient of Section 123(4) of the RP Act, as also Section 100(1) (b), with above finding of fact, answer to couple of issues can be recorded Issue No. 1 is required to be answered in the negative, in view of admission by P that he has no evidence to show election alliance between Shiv Sena-BMP of N1, as also denials of any such alliance, by R1 and even N1. Issue No. 3 will also have to be answered in the negative, so far as imputations against N1 relating to press conference allegedly held by him on 5-4-2004 with consent of R1, are concerned. This will naturally return a negative finding on issue No. 2(a). This will be without going to other ingredient of "corrupt practice" as defined

in sub-section (4) of Section 123, such as, publication statement of fact, the same being false and the maker believing the same to be not true etc.

So far as finding of fact are concerned, with the material on record discussed so far, holding of press conference by N1 and distribution of pamphlet and caste certificate, therein is probablized, but there is no evidence to say with firmness that it was held at room nos. 106/107 or that those rooms were booked for Shri Subhash Shinde. Presence of R1 at the press conference is disprove.

15. Learned counsel Shri Kanetkar for P has placed reliance upon couple of judicial pronouncements on the issue of consent.

In the matter of Sheopathsing vs. Narischandra AIR 1958 Rajasthan 323, reliance is placed upon following observations from paragraph 64 of the judgment.

"In the Act, as it stood before amendment by Act 27 of 1956, instead of the word 'consent', the word 'connivance' was used. Connivance is also a consent in the legal sense. It cannot merely be said that the word 'consent' used in the Act after its amendment, is in any way stronger than the word 'connivance' used before its amendment. The term 'consent' is a legal term and is of wider import as it includes both, express and implied consent. The legislature, therefore, must have preferred to use it in place of the term 'connivance' which did not fully express its intention, for surely it could not have been intended that the election would not be void, if a corrupt practice was indulged in with the express consent of the candidate."

The emphasis by learned counsel was on the term 'tacit consent' which means unspoken or silent consent. In the reported matter, there were numerous instances in which the voters were carried vehicle by the agents of the appellant, some of whom were quite close to him and, therefore, it was held that the appellant could not have been unaware of it.

In the matter at hands, although R1 has admitted relationship with Subhash Shinde, booking of Room Nos.106/107 at Hotel Samarth in the name of Shinde by his authorised agent itself is not proved with firmness.

Ram Kishan vs. Jai Singh, XXXVII ELR 217 (SC), the returned candidate represented the Congress party and the election petitioner, although an independent, had support of Bharatiya Janasangh. The corrupt practices charges, included publication of a poster, containing statements of fact which were either false or were believed to be not true, in relation to personal character and conduct of the election petitioner. The High Court decided that this corrupt practice was, in fact, committed by the candidate or his agent with the consent of the candidate. The finding

of the High Court was upheld by the Supreme Court. It was observed:

“In view of the general power, which K enjoyed in the matter of returned candidate’s election campaign, he must be held to be his agent for the purpose of Section 123(4). This general power was sufficient to establish a kind a prior consent, which is rendered more certain by the subsequent conduct of the candidate in not disowning or contradicting the poster or refusal to pay the charges of printing.”

In the reported matter, it was an admitted position that K was in charge of election campaign of returned candidate. He was admittedly a person in charge of the election of the candidate. The returned candidate had admitted that he had left the conduct of the election to K. K had the poster printed at Chopra Printing Press, Jullundur. The returned candidate stated that he had seen the poster, a week before the poll and his account of election expenses, included payment for the poster. It was in the light of these circumstances, the Hon’ble the Apex Court held that the corrupt practice committed by election agent of the returned candidate, was with the consent of the returned candidate. I am afraid, the circumstances before us discussed hereinabove, are much weaker to draw an inference that N1 held the press conference, published and distributed pamphlet and caste certificate of P, with the consent of returned candidate R1.

The observations from para 6 in the judgement of the Apex Court in the matter of “Mercykutty Aroma v. Kadavoor Sivadasan” reported at 2004 Vol. 2 SCC 217 were relied upon by R1 for claiming that failure to prove the ‘consent’ of returned candidate is fatal to the Election Petition based upon the allegations that any other person indulged into ‘corrupt practice’ for the benefit of elected candidate. The observations read thus:

“The appellant having not been able to prove the consent of the first respondent as regards the publication of the said pamphlet by Marydasan and Vellimon Vijayanandan, the same did not meet the requirements of law as no sufficient evidence has been brought on record to show that any of them was authorized to act on behalf of the first respondent.”

the observations persuade us to reconsider the legal position by reading sections 123 (4) and 100 (1) (b)/100 (1) (d) (ii) of the R.P. Act together.

16. Considering the provisions together, the legal position that emerges may be stated in simplified form as under.

Publication of a statement concerning personal character of a candidate (defeated) which is not only false but maker either believes the same to be false or which is not believed the same to be true is ‘corrupt practice’ if the

statement is reasonably calculated to prejudice the election prospects of that candidate. The election of returned candidate can be declared to be void if such corrupt practice is committed by elected candidate or his election agent or any other person with the ‘consent’ of candidate (elected)/ his election agent. The election is also liable to be set aside if such ‘corrupt practice’ is committed by an agent other than election agent of the returned candidate and result of the election is materially affected by the same.

In the matter at hands, R1 and notices have attacked the case of the P by claiming absence of proof of following things, in view of the fact that publication of none of the statements is attributed to R1 so far as two out of the three incidents of ‘corrupt practices’ are concerned (except distribution of copies of pamphlet on 06-04-2004 onwards).

(i) There is no proof of N1/N2 being agents of R1.

(ii) There is no proof of result of election having been materially affected. (due to above two defects, Section 100 (d) (ii) is claimed to be not available to the P)

If N1 and N2 are considered to be ‘any other person’, the actions attributed to them are not proved to have been committed with ‘consent’ of R1 or her election agent.

The incident of Press Conference dated 05-04-2004 are the actions attributed to N1. Speech at the meeting dated 13-04-2004 is conduct attributed to N2. Distribution of copies of pamphlets and caste certificate on 06-04-2004 and thereafter, is alleged ‘corrupt practice’ attributed to R1. We have already considered the incident of Press Conference and arrived at a conclusion that ‘consent’ of R1 or her election agent for the actions of N1 is not proved. Since it is to be considered whether N1 should be declared as a person having indulged into ‘corrupt practice’, as required by Section 99 of the R.P. Act, we may revert to incident of Press Conference again. However, at present by indicating that the admission of P and failure on his part to prove the ‘consent’, we are in a position to answer issue No. 1 fully and issue Nos. 3, 4 and 2 (a) partly in the negative (so far as those relate to Press Conference).

Before coming to assessment of evidence regarding alleged second ‘corrupt practice’ i. e. distribution of copies of pamphlets and caste certificate from 06-04-2004 onwards by the grassroot workers of BJP and Shiv Sena, we may refer to few reported judgements, relied upon by both the parties, which guide us regarding the standard of proof required in an Election Petition as also the manner of appreciation of evidence and burden of proof.

In “Sunder Singh v. Hardial Singh”, reported at AIR 1985 SC 89, in paras 22 and 23, the Hon’ble the Supreme Court observed thus:

“22. It is now well settled by several authorities of this Court that an allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practice envisaged by the Act, because if this test is not applied, a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election which will adversely effect the electoral process.”

“23. It is thus clear beyond any doubt that for over 20 years, the position has been uniformly accepted that the charges of corrupt practices are to be equated with criminal charges and proof thereof would be not preponderance of probabilities as in civil action, but proof beyond reasonable doubt as in criminal trials. We are bound by the decision in Mohan Singh's case (AIR 1964 SC 1366) (supra) as also by the decisions of coordinate benches and do feel inclined to take a different view.”

The Hon'ble Apex Court had reproduced the parameters regarding standard of proof laid down in earlier judicial pronouncements i.e. Manmohan Kalia v. Yash, reported at AIR 1984 SC 1161 and A. Younus Kunju v. R.S. Unni, reported at 1984 Vol. 3 SCC 346. Reliance is placed by learned counsel for N2 and R1 also on the observations from these two judicial pronouncements which need not now be repeat-reproduced.

Similar view is taken in the matters of “Jeet Mohinder Singh”, reported at 1999 vol. 9 SCC 386 and “Jagjeet Singh”, reported at AIR 1966 SC 773. In the matter of Jeet Mohinder Singh (supra), it is held that onus of proof of the averments in the Election Petition lies on the petitioner and he cannot derive strength from the weakness of respondents' case.

As against this, P has placed reliance upon the observations of the Apex Court in the matter of “Borgaram v. Premodhar”, reported at 2004 Vol. 2 SCC 227. The observations in para 10 of the reported judgement read thus:

“The allegations of corrupt practices are viewed seriously. They are considered to be quasi-criminal in nature. The standard of proof required for proving corrupt practices for all intent and purport is equated with the standard expected in a criminal trial. However, the difference between an Election Petition and a criminal trial is, whereas an accused has the liberty to keep silence, during the trial of an Election Petition, the returned candidate has to place before the Court his version and to satisfy the Court that he had not committed the corrupt practices as alleged in the petition. The burden of election petitioner, however, can be said to have been discharged only if and when he leads cogent and reliable evidence to prove the charges levelled against the returned candidate.

For the said purpose, the charges must be proved beyond reasonable doubt and not merely by preponderance of probabilities as in civil action.”

17. It was propounded on behalf of R1 as also N2 that P has failed to examine any Press Reporter to prove the news reports published in various news papers which are produced and relied upon by the P, the news paper report, according to learned counsel, is secondary evidence of its contents and, therefore, not admissible in evidence without proper proof of the contents within the report.

In “Vimal v. Bhaguji”, reported at AIR 1995 S.C. 1836, following observations regarding the evidence of two reporters who have claimed to have attended the meeting and to have heard the speakers and reported the speeches, are relied upon by R1.

“There is also force in the contention of Mr. Poti that even if there was no publication of the speeches, the contents of such speeches could be proved by examining the persons who had attended the meeting and heard the speakers. Both PWs 14 and 24 have stated that they attended the respective meetings and noted the portions of the speech, which according to their assessment, appear to be important and relevant. It is true that both PWs 14 and 24 are reporters and it is quite likely that they have some expertise in noting down the gist of the speeches or statements made by others for the purpose of effectively reporting the contents of such speeches or statements for publication in the news papers. Both the said witnesses have stated that speeches were long and the speeches could not be recorded verbatim, but gist of portions of speeches as appeared to them important and relevant were noted by them. Such notings or tipans, therefore, become very relevant because admittedly, on the basis of notings made at the speech, the reports were prepared by the said reporters and such reports were published in the news publication.”

It was further observed:

“Unfortunately such notings or tipans have not been produced for inexplicable reasons. Such tipans and notings being the basis of reports published in the newspapers, require to be considered for ascertaining whether reports and depositions were consistent with the notings made at the time of listening to the speeches by the authors of the reports. In our view, the Courts should draw adverse inference against authenticity of the gist of the speeches since published in the newspapers for non-production and the said notings.”

Even in the matter of “Manmohan Kalia v. Yash”, reported at 1984 Vol. 3 SCC 499, the Hon'ble the Supreme

Shrikant Kasbe states that he was part and parcel of election campaign of P and he was campaigning from door to door. On 8th and 9th April, he noticed that Shiv Sena workers were distributing some pamphlets. He received copies of both the pamphlets and handed over those to P. PW-2 Shrikant, who admittedly worked for election campaign of P, has denied a suggestion that none of the pamphlets was distributed by N1. He admits that this was the only election campaign in which he worked for P. He also admits that he has no evidence to show that the person

from whom he received the pamphlet (Navnath Chandne) was the Shiv Sena worker. It is, therefore, difficult to accept the evidence of Shrikant, as proof of distribution of pamphlet by Shiv Sena workers.

PW-3 Sanjay Patole states that on 6th April afternoon some workers of some political party brought pamphlet (Exh.58) to him. However, it is pertinent to note that in his chief examination itself, Sanjay did not state that pamphlet (Exh.58) was delivered by BJP-Shiv Sena workers. It is not his claim that he handed over that pamphlet also, to P. Even on reference to Exh.43, upon written request by P, Sanjay seems to have handed over to P, copies of Exhibits 55 and 56 which were allegedly distributed by N1 in the press conference dated 5-4-2004. He has neither handed over copies of Exh. 58 to P, although he claims to have obtained reaction of P on the same, nor has he been able to produce copy of the pamphlet from his custody before the court. Hence, it is difficult to believe that he had at all received copy of Exh. 58, or that he had received it from Shiv Sena workers.

According to PW-4 Vitthal, Shiv Sena workers, wearing scarfs of the colour of their party, on their shoulders, distributed the second pamphlet बाप दाखव नाहीतर श्राद्ध कर. In the chief examination itself, he states that it was published by Navnath Uplekar (R6). According to Vitthal, he forwarded copy of pamphlet received by him, to P along with communication Exh. 41. On reference to Exh. 41, which is undated communication, to P, it is evident that Vitthal had forwarded two documents, C1 vi z. (i) pamphlet captioned "मांग जातीचा तेलगी" (Exhibits 55 and not Exh.58) and (ii) caste certificate. Deposition of Vitthal contradicts his own communication. Along with Exh.41, he has not forwarded a copy of Exh.58 to P, as deposed on oath.

PW-6 Ashok is a worker of NCP since 1998. He was campaigning for P and on 9th or 10th April 2004, he had seen Shiv Sena-BJP workers campaigning, by distributing pamphlets, which he collected. He has produced those pamphlets while deposing from the witness box, which are marked Exh. Y (1 to 3). The papers contain a copy of Exhibit 58 and two copies of page No. 2 of Exh.55. According to Ashok, he tried to persuade BJP-Shiv Sena workers not to distribute the pamphlets, which appears to be queer. He does not name Shiv Sena worker, as PW-2 Shrikant Kasbe, or PW-5 Bhausaheb Kasbe.

Evidence of PW-5 Bhausaheb and PW-14 Devanand is required to be considered together. According to Bhausaheb, Shiv Sena workers, including Devanand, were distributing copies of both the pamphlets. This deposition is complimented by PW-14 Devanand Rochkari. According to him, R-1 had entrusted the pamphlets to him for distribution. The copies of pamphlets received by PW-5

Bhausaheb are filed by him, while deposing from the box and those are marked as Exhibit X (1 and 2). These are only page No.1 of Exh.55 and a copy of Exh.58. It must be said that except denied suggestion, learned Counsel for R1 has not been able to strike much success during the cross examination of PW-5 Bhausaheb, except admission that now PW-14 Devanand has switched over to NCP.

However, in the cross examination of PW-14 Devanand, quite interesting details of his political career have come on record. In the chief examination itself, he discloses that he joined NCP in November 2005. In the cross examination, he admits that he entered the politics in 1991 and started his political career as a member of Shetkari Kamgar Paksha (Peasants and Workers Party). He switched over to Shiv Sena in the year 1991. He admitted that he had requested for a ticket for contesting legislative assembly seat from Shiv Sena party. But, when he was questioned whether the ticket requested was for Tuljapur Constituency, he replied;

"No. I was in jail and, therefore, there was no question of asking for a ticket."

The single reply puts character of Devanand both, as an individual as well as witness, under clouds. Admittedly, he was in jail in connection with a quarrel with one Ganesh Sontakke. He was charged under Section 307 of IPC and the case is still pending. He had also requested for a ticket to contest legislative assembly seat of Tuljapur Constituency, from Samajwadi Party. He was given the ticket by the said party and he lost that election, by a very little margin. He was second to returned candidate. This was 2004 assembly election. (para 5 of his cross examination by R1). Yet, it is his claim that in April 2004 for election of parliamentary constituency, he was a worker of Shiv Sena and in his such capacity, was entrusted responsibility of distributing pamphlet by R1. If Devanand is to be believed, in the year 2004 he was a candidate of Samajwadi Party for State legislative assembly from Tuljapur constituency and in the same year, he was grassroot worker of Shiv Sena. He has denied suggestion that because he was refused ticket for State legislative assembly by Shiv Sena, he had indulged in stone pelting when Uddhav Thakre, a leader of Shiv Sena, visited Tuljapur. He has also denied a suggestion that he was expelled from Shiv Sena because of prosecution against him under Section 307 of IPC, as also his indulging in stone pelting at the time of visit of Uddhav Thakre to Tuljapur. Admittedly, there are two more prosecutions against him, apart from prosecution for assault on Ganesh Sontakke. The victim of other prosecution under Section 307 of IPC, is son of M.L.A. Madhukar Chavan. In the third prosecution, he is comparatively lucky, as the charge is reduced to Section 323 of IPC.

The political history of witness Devanand indicates that he is capable of violently changing his loyalty.

Reliance was placed on behalf of R1 on the observations of the Supreme Court in the matter of Surinder Singh vs. Hardy Singh AIR 1985 SC 89 and more particularly on the observations in paragraphs 45 to the effect;

“Oral evidence particularly coming from a tainted source cannot form a sole basis of proof of corrupt practice”.

The observations from earlier judicial pronouncement in A. Younus Kunju vs. R.S. Unni (supra), were borrowed with approval. The observations read;

“Admittedly, all these witnesses were the workers of the appellant. There is overwhelming material on the record, and even counsel fairly admitted, that the election was fought on party basis and there was sharp division of electorate on the basis of political parties. That being the position, workers at the election with party alignment would necessarily be political supporters of the respective candidates and when called as witnesses, they would support their stand. Instances are not uncommon where such witnesses support their respective candidates and their cases even though the same be far from truth. In such circumstances, we do not think, on the oral testimony of these four witnesses, the charge of publication of objectionable materials can be said to have been established.”

In the matter at hands, reasons are indicated as to why evidence of PW-2 Shrikant, PW-3, PW-4 Vitthal and PW-6 Ashok, is neither trustworthy nor sufficient to prove the contention of P that Shiv Sena-BJP workers were distributing copies of pamphlets and these witnesses received those. Evidence of PW-5 Bhausaheb and PW-14 Devanand, when considered in the light of history of political career of PW-14 Devanand, causes more damage to credibility of P's than any benefit.

In this context, it must be taken into consideration that copies of Exhibits 55 and 56 were allegedly published by N1 on 5-4-2004 at the press conference. Exhibits 55/56 are purportedly signed by N1, who has admitted his signature on Exh.55, in his say at Exh.110. Exh.58 has a marginal note, indicating that the same is published by R6. These circumstances speak against requirement and possibility of distribution of the pamphlets by Shiv Sena workers.

From the deposition of P, it appears that he took cognizance of alleged mischief, on 12-04-2004, when he wrote to Tahsildar, North Solapur about the caste certificate.

He had also complained to the Collector on 20-4-2004 (Exh.70). According PW-11 Dr. Sheshrao, the then Sub-Divisional Officer and Assistant Returning Officer, P had complained to the Collector in his capacity as Returning Officer, by communication dated 8-4-2004 (but about xerox copy of caste certificate annexed to the complaint). Collectively at Exh.70, is also a copy of complaint filed by P to Osmanabad City Civil Police Station, on 24-5-2004. (after declaration of election results). In none of these complaints, which were much after alleged distribution of copies of pamphlets by Shiv Sena workers, P has made any reference to such distribution. Absence of reaction on the part of P to the alleged distribution of 35,000 copies of the pamphlets within the constituency, further confirms unreliability of the witnesses and story tried to be proved through them. Taking into consideration parameters regarding standard of proof, it can be said that the P has not proved the case of distribution of pamphlets (Exh.55 and 58) by Shiv Sena workers between 6-4-2004 to 17-4-2004, as alleged in paragraph 25 of the petition, much less there is any proof that those were distributed at the instructions of R1. The reasons discussed should suffice a negative finding on issue No.2(c).

19. In order to trap actions of N1, of press conference dated 5-4-2004 and that of N2 of speech in the meeting dated 13-4-2004, learned counsel for P has placed reliance on Section 100 (1)(b) of the RP Act, by claiming that N1 and N2 fall in the category, “any other person”. On reading Section 123(4), as also Section 100(1)(b), it is evident that consent of the returned candidate is essential ingredient in both. Probably, that is why reliance is also placed on Section 100 (d) (ii), which does not require consent of returned candidate. This is obviously because, the said provision requires two different ingredients to be proved. The corrupt practice committed by an ‘agent’ other than election agent of returned candidate, attracts a declaration of election being void, if the result of election is materially affected. The term “agent” is not defined by the RP Act. The petition does not describe these two individuals (N1 and N2) as agents, other than election agents of R1. The term ‘agent’, as understood by Contract Act, means a person employed to do any act for another or to represent another in dealing with third person. There is no material on (78) record, either pleadings or in the evidence, that will indicate R1 having employed N1 and N2 as her agents, other than election agents, to act on her behalf during election campaign. Viewed thus, it must be said, Section 100(1)(d)(ii) is not available to P to rely upon, irrespective of the fact, whether the actions of N1 and N2 have affected the result of election, materially.

20. Regarding speech delivered by N2 in the meeting dated 13-4-2004.

P has examined two witnesses on this aspect and he has also placed reliance upon news report as appeared in

the press about the said meeting. PW-13 Yuvraj Shinde (Exh.73) and PW-15 Dilip Telang (Exh.75) are the workers of Bahujan Rayat Parishad, constituted by P. Both of them participated in the election campaign of P at the subject election. Both of them claimed to have attended the meeting dated 13-4-2004 wherein N2 was the main speaker, that being election campaign meeting of Shiv Sena candidate R1.

PW-13 Yuvraj has deposed that the meeting was held in the open ground of Pushpak Mangal Karyalaya wherein N2 was the last speaker. By the time he reached the venue at about 6.00 p.m., the meeting had already commenced. N2, during his speech, showed a piece of paper in his hand by raising the hand and said that P belongs to Holar community and not to Matang community. N2 also said that P had enjoyed various positions in the Government, by misguiding the community. According to PW-13 Yuvraj, the paper that was being raised by N2 was said to be the caste certificate of P.

PW-15 Dilip confirms that meeting was over at about 7.30 p.m. after last speech delivered by N2. He also narrates that N2 showed a piece of paper and said that it was a caste certificate of P, showing him to be belonging to Holar community and Matang community. He said that P is hypocrite and has deceived the community, because he assumed various positions including that of a Minister on the basis of caste certificate of belonging to Matang community, although, in fact, he belongs to Holar community.

Both these witnesses also added, R1 to have said that the certificate was not the only piece of evidence, she could produce a heap/cartload of evidence. Both of them also claimed that when they spoke to P about it, he reacted by saying that it was a political stunt.

The details regarding this meeting are pleaded in paragraph 26 of the petition and it is said that N2 made a statement of fact, by referring to alleged false certificate-Exh.G and pamphlet-Exh. F (Exh.56 and 55), whereafter the statement, as reported in daily Samna dated 14-4-2004 is quoted as under:

"He (i.e P) obtained a false certificate of being of Matang caste, though he is not Matang by caste and contested election and got entry/berth in Government i.e. Ministry. This is what his honesty is."

Although it is pleaded that N2 during his speech referred to caste certificate (Exh.56), as well as pamphlet (Exh.55), P does not specifically plead that N2 was having either of the documents in his hands and he was showing it, by raising the hand. In fact, it must also be taken a note that both the witnesses examined do not mention N2

possessing a copy of pamphlet (Ex. 55) as pleaded. The narration of the witnesses that N2 was waiving the caste certificate while delivering the speech as above, is required to be looked with disbelief, that being an improvement over and above the pleadings.

During the cross examination of PW-13 Yuvraj, it has come on record that he is Vice President of Bahujan Rayat Parishad, an organization formed by P. His taluka Tuljapur is not part of Mangalvedha Legislative Assembly Constituency. Admittedly, he had not participated in the election campaign of P during elections for State Lagislative Assembly. When we read his cross examination paras 2 and 3, it is full of answers "I do not remember". We can attribute his inability to tell whether there was any banner behind the speaker or banners at other locations on the stage than the back wall, to loss of memory. But, he claims loss of memory also on the speeches delivered by various speakers, including N2 on some aspects. He does not remember if N2 criticised any other individual, except the P.

Cross examination of PW-15 Dilip reveals that he is working as a government contractor of "A" category, which is the highest category and he accepts contract works of State Government offices. His cross examination also contains many answers "I do not remember" or, "I do not know". He also does not remember if there was any banner and what was the writing on the banner. He did not see banner behind the speakers or at any other location on the stage than back wall. He also did not see any cut outs. He is unable to describe where N2 was standing for delivering his speech.

N2 has examined Vasant Alanikar, a photographer, who has filed five photographs with negatives of the said meeting dated 13-4-2004. These photographs are brought on record, in order to contradict PW-13 Yuvraj and PW-15 Dilip, by demonstrating that they do not know the details at the venue and thus persuade the court to believe that they are tutored witnesses, deposing without attending the meeting. On perusal of photographs at Exh. No. 118 to 122, it can be seen that, there is a banner at the back wall of the stage as also in front of the stage. There are cut-outs of N2 on both sides of the stage. On right side of the stage, there is podium for the speakers and to the left side of the stage, there is a bust of Shivaji Maharaj and couple of photographs, one of which is of Dr. Babasaheb Ambedkar. We have only taken a note of bold features and at least a banner right in front of the stage, the two cut-outs of N2, the bust of the Shivaji Maharaj and Photographs of Dr. Babasaheb Ambedkar, are certainly the things which one, who had attended the meeting, could have remembered, if not their location with accuracy. Viewed thus, there is reason to doubt the reliability of depositions of these two witnesses. This is also because of their improvement over the pleadings.

Although quite a good number of press reports are produced at Exh. 47 and 48, clipping from daily Samna dated 14-4-2004 at Exh. 47, is the only press report pertaining to this meeting. Admittedly, Samna is a newspaper which projects the view and philosophy of political party Shiv Sena. Along with the petition at Exh. E-2, P has produced a copy of daily Sakal dated 14-4-2004 and at Exh. 1-1, press report from daily Sangharsha of the same date. Eventually, while deposing from the witness box, these two press reports were neither referred nor relied upon by the P and, therefore, it is required to be inferred that those press reports do not contain any details supporting the pleadings in the petition, regarding what was the speech delivered by N2, thereby attracting Section 123 (4) of the RP Act.

Samna appears to have reported N2 to have made a statement as pleaded in para 26 of the petition and quoted herein above, but it does not refer to his having a caste certificate and waiving the same while delivering the speech. The observations in the matter of Surinder Singh Vs. Hardayal Singh AIR 1985 SC 89 and A. Younus Kunju, (1984) 3 SCC 346, referred in para 18 above, regarding reliability of the witnesses, who are members of one political party, when election is fought on party basis, apply to the evidence of PW-13 Yuvraj and PW-15 Dilip.

In making a statement that R1 in her speech claimed that the caste certificate is not the only piece of evidence regarding false caste certificate claim by P, but she has a heap/cartload evidence, is the glaring incident of eagerness of these witnesses to support their party. Here, it must not be lost sight that P has not attributed any act to R1 of having assailed his caste claim during her speech. Both these witnesses, PW-13 Yuvraj and PW-15 Dilip, admit that N2 was the last speaker. If the caste certificate was not referred till then, it is improbable that R1 during her speech delivered before the speech of N2, would make a statement that one caste certificate is not only piece of evidence. Such a probability can exist, only if she herself assails the caste claim of P, which is not his case or she delivers her speech after a speaker who assailed caste claim of P, by referring to the caste certificate.

A report in daily Samna dated 14-4-2004 is not supported by deposition of the reporter, but if at all, only by evidence of PW-13 Yuvraj and PW-15 Dilip. Observations of the Supreme Court in the matter of Borgaram, (2004) 2 SCC 227 reproduced in paragraph 17 above, also hit at the evidentiary value of press reports in Samna that is relied upon by P.

Learned Counsel for N2 did not fail to rely upon the observations of the Supreme Court in the matter of Shivajirao Vs. Vilasrao, (2001) 1 SCC 398 to following effect:

“When the best evidence available in respect of the issue has been withheld, an adverse inference has to be drawn and the issue cannot be held proved.”

Shri B.D. Joshi, learned Advocate for N2, was referring to non production of video cassettes of the election meeting dated 13-4-2004 during which N2 is alleged to have delivered objectionable speech. According to him, now-a-days, election meetings are covered by the Election Commission, by video recording and P ought to have produced the same. However, in the absence of any such evidence that the meeting was so covered by video recording by the Election Commission, I am not inclined to give weight to this argument.

Taking overall view of the evidence on the issue of meeting dated 13-4-2004, because of press report in daily Samna, if considered as supported by evidence of PW-13 Yuvraj and PW-15 Dilip, there is room to say that, P has created a possibility of N2 having made a statement during his speech about P's caste claim of belonging to Matang community to be false. However, allegation that N2 was having a caste certificate with him and that he was waiving it, is not sustainable. The possibility of having made a statement during the speech is also not of the standard expected in election petition i.e. standard of proof as expected in a criminal trial.

It has been vehemently urged that consent of R1 to the statement by N2 must be presumed, because she was present on the dais for the said meeting in which N2 delivered the speech, including objectionable part, assailing P of having made a caste claim. In fact, having arrived at a conclusion that N2 having made such a statement is a probability created, but not the fact established to the extent of requisite standards expected in election petition and, therefore, issue of 'consent' is of less significance.

In order to propound that silence of R1 at the meeting and her not having taken any action to dissociate herself from the statement made by N2, her implied consent is required to be presumed, reliance was placed by learned counsel for P on the reported judgment in Ramesh Prabhu v. Prabhakar Kunte, AIR 1996 SC 1113. It was a case based on corrupt practice as defined under Section 123 (3) and (3-A) of RP Act. Three speeches were made by Balasaheb Thackeray on 29-11-1987, 9-12-1987 and 10-12-1987. Appeal made to the voters was clear appeal to Hindu voters to vote for returned candidate Ramesh Prabhu, because he is a Hindu. First speech also made derogatory reference to Muslims, by calling them as 'snake' and referring to them as 'Lande'. The language, therefore, was held to be an attempt to promote feelings of enmity / hatred between the Hindus and the Muslims on the ground of religion.

So far as issue of consent, which is ingredient of both sub-sections (3) and (3-A) of Section 123 of RP Act is concerned, following details are recorded in paragraph 59 of the judgment.

The three speeches of Shri Thackeray were admitted. The interview of Dr. Ramesh Prabhu and its text published in Janmabhoomi Pravasi was also admitted. Dr. Prabhu was then the Mayor of Bombay. He admitted his presence in the meetings held on 29-11-1987, 9-12-1987 and 10-12-1987 in which, the above speeches were delivered by Shri Thackeray. He admitted speaking himself also in these meetings (all three).

Thus, Shri Prabhu had at least reasonable opportunities to express his dissociation from the statement made by Shri Thackeray. On the contrary, in his deposition Shri Prabhu expressly admitted that the speeches of Shri Thackeray were according to his election campaign. It was in the light of these details, the Hon'ble Apex Court held that the element of candidate's consent for the appeal to the voters by Shri Thackeray in his speeches was, therefore, adequately proved.

R1, in our case, can be seen to be not in to our in the same position as Dr. Prabhu Ramesh reported case. It was only one meeting she shared dais with N2. N2 delivered speech after her speech. N2 has not repeated the statements in more than one meetings in presence of R1.

Referring to cross-examination of P by N2 and more particularly para 5, admissions are obtained from P that when Shri R.R. Patil held election campaign meeting for P, Shri R.R. Patil was the last speaker, who had delivered extempore and he had not consent obtained from P by showing the text of his speech. Such an admission is obtained in order to the Court to draw an inference that N2 must not have obtained consent of R1 by pointing out to her the text of speech likely to be delivered. The relationship between P and Shri R.R. Patil is similar to relationship between R1 and N2, the first one being the contesting candidate for Parliamentary election and the second one being the leader of the respective parties, in both the cases. It is also admitted by P, by the time meeting dated 13-04-2004 took place, he was still having correspondence with authorities and had not received conclusion regarding falsity of the caste certificate till then. On the contrary, he has also admitted that there was publicity to the pamphlets allegedly distributed by N1. This is aimed at ruling out any possibility of argument that R1 must have conveyed the details on the basis of which N2 could assail P as a person making false caste claim, during his speech.

21. We may sum up the findings on questions of fact, those arise in this election petition, as deducible from the discussion so far.

(i). There is a fair probability of N1 having held press conference on 5-4-2004 and having distributed copies of pamphlet (Exh.55) and caste certificate (Exh.56) at the same. However, it is not proved that the press conference was held in room Nos. 106 and 107. It is

also not proved that it was held with the consent or at the behest of R1. Presence of R1 or any Shiv Sena workers at the press conference is firmly disproved.

(ii). Distribution of copies of pamphlet (Exh.55) and caste certificate (Exh.56) from 6-4-2004 to 17-4-2004 by grassroot level workers of Shiv Sena/BJP is not proved.

(iii). A faint probability of N2 having referred to false caste certificate of P to be belonging to Matang Community, during his speech in the meeting dated 13-4-2004, has come on record but not with the requisite standard of proof expected in election petition. It is not proved that N2 was having a copy of caste certificate of P or that he was waiving it. There is also no proof that N2 had 'consent' of R1.

(iv). There is no evidence on record to hold that either N1 or N2 were agents (other than election agents) of R1.

With the findings as above, the fate of the election petition, I believe; stands determined by recording findings on all the issues as hereinbelow. While doing so, I am hypothetically presuming that there was publication of a statement by N1 at the press conference dated 5-4-2004 and N2 delivered his speech at the election meeting dated 13-4-2004. Since the statements accuse P, of having made a false caste claim of belonging to Matang Community, although he belongs to Holar Community and, therefore, his being a fraud on society, it is possible to accept that the imputation was aimed at his personal character. Since both the statements have commenced after election programme had rolled with notification dated 24-3-2004 and 5-4-2004 (3.00 p.m.) being the deadline for withdrawal of nominations, it can be said that the statements were made at the time opportune and, therefore, calculated to prejudice the election prospects of P. Yet, leaving the issue open, whether the statements were false to the knowledge/belief of the makers or at least makers did not believe those to be true, the petition appears to have failed, for following reasons.

As discussed in paragraph 19 above, neither of the noticees (N1 & N2) can be treated as 'agent' of returned candidate R1. There is no evidence supporting such a contention. Consequently, Section even if it is not available to P to rely upon, even if it is hypothetically presumed that the election result is materially affected by such statements. (Although this aspect is not discussed on merits).

I have recorded that neither of the noticees can be said to have made statements with the consent of returned candidate R1. The consent of elected candidate is an essential ingredient of corrupt practice, as defined by Section 123(4) of the RP Act, as also condition precedent

for Section 100 (1) (b) to be available for P to assail the election of R1. Having held that "consent" of R1 not being proved, Section 100 (1) (b) is not available, because even the corrupt practice, as defined under Section 123(4) of the RP Act, does not stand proved.

Hence, issue 2(a) read with issue No.3, 2(b) read with 3 and 2(d) read with 3, will have to be answered in the negative, in view of lack of proof regarding 'consent' of R1.

Issue No. 4 will have to be answered in the negative as the actions of N1 and N2 do not attract definition of "corrupt practice" due to lack of "consent" of R1.

Issue No. 1 regarding support of N2 to candidature of R1 and issue No. 2(c) regarding allegation of distribution of copies of pamphlets between 6-4-2004 to 17-4-2004, are already answered in the negative for the reasons recorded earlier.

Issue No. 2(e), pertaining to speech by Shivsharan Birajdar and issue No. 5, regarding preliminary objection to the maintainability of election petitions are already answered in the order dated 4-6-2007 election petition, are negative, in earlier (Exh.101-A).

The petition, seeking relief of declaration of election of R1 to be void, as also declaration that P is duly elected candidate as under Section 101 of the RP Act and alternate relief of fresh election, will have to be dismissed.

22. With the conclusions as above, the issues whether statement was false and whether false statement was published/made by N1 and N2, respectively, remain of academic interest. Either the two pamphlets together with the caste certificate of P belonging to Holar community (Exh-55/58 and Exh-56) or the statement attributed to N2 during speech delivered on 13-03-2004, they alleged P of having deceived the society at large by claiming to be a member of Matang community, although he belongs to Holar community. After inquiries with the revenue authorities or authorities which issued caste certificates, P arrived at a conclusion, before filing the Election Petition, that certificate, copies of which were distributed by N1 and which showed P belonging to Holar community is false as the same is never issued by the authority by which it is purportedly issued. Thus, apparently till then, even the conduct of P shows signs of uncertainty. This is mysterious. It was not so argued either by R1 or N2, but fact remains that P has not reacted sharply, although all his witnesses claimed that soon after the Press Conference as also after receipt of pamphlets allegedly distributed between 16th to 17th April, 2004, they approached P, they showed him the certificate and the pamphlets and they also asked for his reaction. If at all, we may enlist the reactions which have come on record in the evidence of all P's witnesses.

According to PW2 Shrikant, when he approached P with the two pamphlets received by him on 8th or 9th April, 2004, P reacted by saying that it was cunning move of election campaign and they should ignore it. PW3 Sanjay approached P on the next morning after the Press Conference and showed him pamphlet and caste certificate. Petitioner reacted by saying that certificate is false and he does not belong to Holar community. P said that, contents of pamphlet are also false. When Sanjay approached after receiving a copy of pamphlet (Exh.58) distributed in the Constituency, P only said that there was a cunning plan against him. PW4 Vithal had approached P with the documents distributed at Press Conference and P reacted by saying that these were unnecessary defamatory allegations against him. PW5 Bhausaheb after receiving copies of pamphlets from PW14 Devanand Rojkari challenged P as to why P deceived them. P reacted by saying, it was false and cunning plan against him. Admittedly, the false caste certificate was also published in "Osmanabad Times" (Exh-48) dated 07-04-2004. When PW6 Ashok Jadhav approached P with the copies of the pamphlets, P simply explained that carpet under the feet of his opponents was about to go away, his victory was certain and hence, they were making false and adverse propaganda.

It is pertinent to note that although couple of witnesses say that P expressed contents to be false or the propaganda to be false, there was no spontaneous, sharp and strong reaction on the part of P. If P had never obtained caste certificate of belonging to Holar community, he ought to have known that a false caste certificate showing him to be of Holar community is fabricated and is being used for propaganda against him. If he was certain, he could have gone to press immediately, since couple of witnesses who approached him for reaction were Press Reporters. He could have requested them to publish his reaction that the caste certificate, copies of which were being distributed and in which he was shown to be a member of Holar community, is a fabricated document and that he had never obtained such a certificate. On the contrary, he approached authorities from Solapur district by communications dated 08-04-2004, 12-04-2004 and 20-04-2004. Communication dated 08-04-2004 is not on record, but PW-11 Dr. Sheshrao Savargaonkar has deposed of P having so complained. Although PW11 Sheshrao stated that he had brought original complaint for ready reference, either complaint or contents of the same are not brought on record during chief examination of Dr. Sheshrao. So far as complaint dated 12-04-2004 (marked "X" during deposition of PW9), the reply to the same by Tahsildar of North Solapur is at Exh-45. The reply informs the P that in the register through which caste certificates are issued at Serial No. 735/95 dated 27-04-1995, there is no entry regarding caste certificate issued in his favour, but the said entry is in favour of

Deokare Sangita Pandurang -Chambhar. In the compilation of communications collectively Exh-45, undated complaint by P and another complaint dated 21-04-2004 appear to be communications by P to ascertain that no such caste certificate is issued by the competent authority.

It is difficult to digest this reaction as correct reaction of P. If he had never obtained a certificate indicating him to be belonging to Holar caste, his reaction ought to have been spontaneous, sharp and strong. He could have reacted with prosecution at that time only, instead of indulging into collection of evidence that no such certificate was issued. He ought to have gone to the press to declare that the caste certificate, copies of which were being circulated by N1 was false certificate. There could not have been any other reaction which can be termed as in harmony with fact-situation reaction, taking into consideration that canvassing for the election had begun. On the contrary, in his cross-examination on behalf of N2, P admits :

"It is true, by the time meeting dated 13-04-2004 took place, I was still having correspondence with the authorities and I had not received conclusion regarding falsity of certificate till then."

Thus, there is every reason to believe that till last communication from revenue authorities dated 24-05-2004, P himself was not certain of the caste certificate showing him to be of Holar community to be false.

P has produced at Exh-29, Exh-30, Exh-31 and Exh-32 documents showing his caste to be Hindu Mang. These are, school leaving certificates from his primary school, caste certificate dated 11-07-1991, issued by Taluka Executive Magistrate, Mangalvedha, caste certificate in favour of his wife Anuradha issued on 06-02-1998 by Deputy Collector (EGS), Solapur and caste certificate in favour of P dated 11-03-2004 issued by Deputy Collector (EGS), Solapur. Exh-30 is a certificate issued in favour of P on application by Shri Vijay Soma Kharatode. Thus, there is an incident on record that P had obtained his caste certificate on the basis of application by third person. The copy of the caste certificate (allegedly distributed by N1) which is in Marathi file below Exh-58 bears an endorsement at the top as under :

- "Read : 1. Application of Shri Dhoble L.K.
2. School leaving certificate issued by H. M. (illegible).
3. Boys N/O Solapur by applicant's son and affidavit."

It is difficult to decypher all details, but curiously enough, there is reference to applicant's son and also an affidavit. Unfortunately, neither party took a notice of the same.

In this context, we may refer to the Press Reports relied upon by P. Press Report from "Osmanabad Times" dated 07-04-2004 has published a picture of the caste certificate and news item states that N1 and Eknath Avad, both claimed at the Press Conference to have received telephonic calls from P. N1 was offered Rs. 50 lacs for keeping silent and otherwise threatened of dire consequences. The moot question that we are required to ask, whether N1 or N2 or anybody else, who had known the contents of his caste certificate and read about the version of N1 regarding threats accorded by P, in the light of absence of any reaction on the part of P in the Press, could not have been tempted to believe the certificate to be true? In fact, P himself arrived at a conclusion of caste certificate to be fabricated and false, only on 24-05-2004. In these circumstances, can P claim that the caste certificate was proved to be false by the time N1 and N2 indulged into alleged corrupt practices? And if that be so, can it be said that N1 and N2 believed the certificate to be false or atleast did not believe the same to be true ?

Although P has produced other documents, and more particularly his caste certificates obtained from time to time, showing that he belongs to Matang community, he has not produced 'caste validity certificate' obtained from competent Scrutiny Committee. This is in spite of the fact that he claims to have contested elections by claiming to be of Matang community.

Likewise the newspaper and press reports contained therein, although those may be primary evidence of what is reported in the press, those are secondary evidence of the events reported therein, the correspondence produced by P and more particularly the replies received by him from the authorities regarding the entries in the register is secondary evidence and original register was not produced for the perusal of the Court. In fact, on reference to evidence of PW11 Dr. Sheshrao Savargaonkar, there is reason to believe that Collector, Solapur had inquired with Tahsildar, South Solapur and not Tahsildar, North Solapur. Although PW Dr. Sheshrao said that North Solapur is a clerical error, he was also forced to admit that even the office notings by Awal Karkun contained the reference to Tahsildar, South Solapur. This quality of evidence of Dr. Sheshrao which kept the doubts open whether the Collector Solapur had replied the inquiries of P by reference of the same only to Tahsildar, South Solapur, forced P to examine PW6 Bhikaji Sankhpa 1. PW6 deposed that the certificate, copies of which were allegedly distributed, does not bear his signature and that he was the Executive Magistrate for North Solapur at the material time, and although he deposed that note of certificate issued, is taken in the register, he had not come to Court after examining the caste certificate register to ascertain whether any such certificate was issued through office of

Tahsildar, North Solapur. No doubt, communication (Exh-45) from Tahsildar, North Solapur, dated 15-04-2004, can be said to be clearing the doubts because it informs that on inspection of register of caste certificates issued to Scheduled Caste people, entry No. SR735/95 (the same outward number as on the certificate, purporting to have been issued to P, regarding his belonging to Holar community) dated 27-04-1995 is not an entry pertaining to P but the said entry is pertaining to one Sangita Pandurang Chambhar. However, this communication refers to entry dated 27-04-1995, whereas certificate of P is dated 27-03-1995. That is why, it can be said that production of original register for inspection of the Court was necessary.

For all the reasons discussed hereinabove, it must be said that P has not proved beyond reasonable doubt that the caste certificate was fabricated and false one.

23. In order to claim that P has proved that N1 and N2, while making the statements against the personal character of P that his caste claim is false, either by publication of caste certificate, showing P to be belonging to Holar community and the pamphlets in case of N1 and by speech in case of N2; believed the statements to be false or they did not believe the same to be true, learned Counsel for P has relied upon technical arguments. He has claimed that R1 has not denied P's pleadings to this effect specifically and, therefore, evasive denial amounts to admission. In para 22 of the petition, it is pleaded that the statements in the certificate and pamphlet allegedly distributed/caused to be distributed by N1, are false to the knowledge of N1, which he believed to be false or did not believe to be true. The contentions in paras 22 to 25, are replied by para 14 of the written statement (Exh-17) by R1. R1 has denied any knowledge of such publication/distribution by N1 till the time she learnt about the same because of allegations by P in criminal complaint. She has denied any alliance with N1. She has denied to have consented to the statement either by N1 or N2, or that such publication was for her benefit. There is no specific sentence in this para saying :

"It is denied that statements were false to the knowledge of the makers or that makers believed those to be false, or makers did not believe those to be true."

On the contrary, it is contended that the question of denial or otherwise relating to these pamphlets, has no relevance, for want of knowledge of publication itself.

In para 18 of the petition, by sub-para numbered as (a) to (g), P has incorporated all the averments as contained in the two pamphlets. In his written arguments (Exh-124), learned advocate for P has referred to paras 15, 19, 18A and 17, 18, 22 and 24 and claimed that these pleadings are not

specifically denied. The averments that Bahujan Majur Party had rendered full support to R1 and that Shri Shinde of Niraj Gas Agency was Chief Campaigner of R1, are specifically denied by written statement (paras 10 and 11). Contents in paras 16 and 19 are denied by written statement (para 12). In fact, there is no para 18A in the petition.

It can be said that all the averments of P are denied by R1, either by claiming absence of knowledge or by specifically saying that she denies those. No doubt, none of the denials in written statement is recorded in the same fashion, as is generally done in written statement filed in a Suit, nor it can be expected of R1 to quote every sentence from the petition and to say that she denies it.

In "Smt. Saroj Sandesh Naik (Bhosle) v. Shri Suryakant Venkatrao Mahadik", reported at (1991) 1 Bom. C.R. 488, following observations from para 7 were relied upon by learned counsel for P. This is a judgement by learned Single Judge of this High Court:

"There is a basic difference between an election petition and a criminal trial. In a criminal trial, the accused is not required to file written statement before the commencement of the trial. But not so in an election petition. If he does not file written statement, perhaps the Court can give a judgement for want of written statement or perhaps the Court can proceed under Order-VIII Rule-5 Sub-Rule 2 of the Code of Civil Procedure on the basis that the respondents admit the allegations in the petition. Similarly, he has a duty to be fair to the Court in as much as an election petition, the object being purity in electoral process, the entire constituency is before the Court. He has a duty to tell the truth and particularly the facts which are within his knowledge. Of course, before holding that the alleged corrupt practice is proved the Court will insist on better standard of proof than a civil matter."

In the matter of "Sushil Kumar v. Rakesh Kumar", reported at 2004 SC 230, reliance was placed upon paras 66 to 70. In the election petition, petitioner had alleged that elder brother Rajesh Kumar of respondent Rakesh Kumar was a student of BIT Meshra School, where he had recorded his age to be 22 years on 28-07-1999 and, therefore, conclusion can be drawn that younger brother Rakesh Kumar was at least less than 22 years in the year 1999. This statement was not specifically denied, but it was said that by imagination, Rajesh Kumar is mentioned as elder brother and that the petitioner has no knowledge about that and wrong statement is made. Referring to Order VIII Rules 3 and 5 of the Code of Civil Procedure and Section 58 of the Indian Evidence Act (which lays down that facts admitted need not be proved), the Hon'ble the Apex Court held that the allegations would be deemed to have been admitted.

Distinction between the fact deemed admitted in the reported judgement and the fact sought to be argued as deemed admitted in the present case, must be borne in mind. The fact not denied specifically in the reported judgement was age of the real brother of respondent. In the matter at hands, P desires deemed admission on the part of R1, because she does not deny actions (publication of statement which are false to the knowledge of N 1) attributed to N1, and in spite of the fact that R1 has specifically denied an alliance with N1. Order-VIII Rules 4 and 5 of the Civil Procedure Code read as under :

“O-VIII- Written statement, set-off and counter claim.

4. Evasive denial-Where defendant denies and allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part of that or else, set out how much he received. And if any allegation is made with diverse circumstances, it shall not be sufficient to deny it alongwith those circumstances.

5. Specific denial.

(i) Every allegation of fact in the plaint if not denied specifically or by **necessary implication**, or said to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.

Provided that the Court may in its descretion require any fact so admitted to be proved otherwise than by such admission.”

In this context, we also cannot ignore Section 87 of the R.P. Act, which runs thus :

“87. Procedure before the High Court.

(1) Subject to the provisions of this Act and of any Rules made thereunder, every election petition shall be tried by the High Court **as nearly as may be**, in accordance with the procedure applicable under the Civil Procedure Code, 1908 (5 of 1908) to the trial of suits.

Provided that the High Court shall have discretion to refuse, for reasons to be recorded in writing to examine any witness or witnesses”

(2) The provisions of Indian Evidence Act, 1872 (1 of 1872) shall **subject to the provislons of this Act**, be deemed to apply in all respects to the trial of an election petition.

The portions under lined for the purpose of emphasis clearly indicate that applicability of the Civil Procedure

Code or Evidence Act to the proceedings of Election Petitions is not in supersession of the provisions of the R.P. Act. On reference to proviso to Rule 5, it can also be said that deemed admission for want of specific denial can certainly not be equated with final or conclusive proof, and that is why the Court is left with discretion to require **any fact so admitted** to be proved otherwise than by such admission. Thus, even if any fact is deemed admitted for want of specific denial, Court will have discretion to require the election petitioner to prove the same, otherwise than by such admission and it may not be incorrect to say that the presumption that may arise due to deemed admission, would be rebuttable. (emphasis supplied).

Learned counsel Shri Kanetkar has placed reliance on observations of the Supreme Court in the matter of “Subhash Desai v. Sharad Rao” reported at AIR 1994 S.C. 2277, from para 29. These are observations borrowed from “Kumara Nand v. Brijmohan” reported at AIR 1967 SC 808, which is also relied upon by the learned counsel for P. The observations are as follows :

“The onus to prove the charge of corrupt practices under section 123 (4) was on the election petitioner, but the onus on him to prove that the maker of the statement believed to be false or believed not to be true is very light and can be discharged by complaining candidate swearing to that effect, once that is done, the burden shifts to the candidate making false statement of fact to show what was his belief.”

So far as case of “Subhash Desai” is concerned, in the written statement, he admitted the fact that he had published the news item in question, submitted to him by the news reporter. In the written statement, he categorically denied that the report published in the newspaper “Samna” was a false report. In other words, he took a stand that what was published was a correct statement of fact. It was in these circumstances, the Hon’ble Supreme Court relied upon observations in the matter of “Kumara Nand” and held :

“But in the facts and circumstances of the present case, according to us, once the respondents asserted and stated on oath that the statement of fact published in the “Samna” was false and said statement had been published by the appellant knowing it to be false or believed not to be true, it will be deemed that respondent has discharged the initial onus which rests on him. Then, the onus shifts to the other side i.e. to the appellant.”

As a reminder to ourselves, it must be recorded that in the reported judgements relied upon by learned counsel for P, the statement were attributable to the candidate himself. In our case, the statement made are attributable to

N1 and N2 and, therefore, the question of “consent” of R1 to the actions of N1 and N2 is an issue of greater importance than her knowledge of statement being false or belief that those were not true. In any case, she cannot be expected to know that N1 and N2 were making statements inspite of knowledge that the statement were false or believed that those were not true. The evasive denial of R1 on this aspect i.e. knowledge of statements being false or belief of the same not being true, therefore, will not give the same advantage to the election petitioner in the matter before us, as in the reported judgement relied upon by learned counsel for P. While discussing some of the facts, we have already indicated that in the reported matters, returned candidates had accepted the responsibility of publication and even claimed that published material was true. It was in the light of those circumstances that the Hon’ble Apex Court observed the onus of the petitioner to be lighter and his statement on oath that elected candidate believed the published statement to be false or not to be true, as sufficient to shift the onus on the returned candidate.

Since we have expressed above that, the “consent” of R1 is an issue of greater importance in this matter, although I have recorded that “consent” of R1 to the publications by N1 (para 14 ante) and speech by N2 (para 20 ante) is not proved, I am reverting back to the issue of her “consent” to the speech delivered by N2, because reliance by learned counsel for P on the case of “Kumara Nand v. Brijmohan” reported at AIR 1967 SC 808, on that aspect, has remained to be discussed in para 20 ante.

The learned counsel has placed reliance upon contents in para 17 of the reported judgement, to the following effect :

“ In the present case, the poem is not actually read by the appellant, but it was read in his presence at a meeting at which he was presiding, by Avinash Chander. In these circumstances, the High Court was right in coming to the conclusion that the recitation of the poem by Avinash Chander at the meeting amounted to the publication of the false statement and fact contained in it by another person with the consent of the candidate, and in this case even of his election agent who was also present at the meeting. But the responsibility for such publication in the circumstances of this case is of the candidate and it is the candidate’s belief that matters and not the belief of the person who actually wrote with the consent of the candidate.”

Thus, belief of the candidate is material, only when the “consent” of the candidate to making of publication of a false statement by any other person, is proved to be with the “consent” of the candidate or his election agent. No doubt, in the reported matter, poem recited by Avinash

Chander was held to be with the “consent” of the petitioner therein. It was in the light of facts discussed by the Hon’ble Apex Court in para 3 of the reported judgement. The poem was held to have been composed by Avinash Chander. It was not disputed before the High Court that poem in question was aimed at the respondent and he was the target. The High Court found that poem in question was read at an election meeting over which appellant was presiding. Avinash recited the poem. The booklet containing the poem was printed at the instance of one Chand Mohammad who was polling and counting agent of the appellant and who had also paid amount to Avinash for it. The appellant had seen the booklet containing the poem sometime before the meeting and had read it. The booklet containing the poem was printed with the knowledge and approval of the election agent of the applicant. It was in the light of this background, recitation of the poem by Avinash at the campaign meeting presided over by the appellant candidate, was held to be a statement with consent of the elected candidate.

In the present case, the submission of learned counsel for P that either by evasive denial on the part of R1, or by statement on oath of P, it should be accepted that makers believed the statement to be false or atleast did not believe the same to be true, is replied by learned counsel for R1 and N2 by placing reliance upon the observations of the Supreme Court in the matter of “Jageet Singh v. Gyani Kartar Singh”, reported at AIR 1966 SC 773. This is a judgement rendered by a Bench of three Hon’ble Judges and the ratio laid in para 25 reads thus :

“In considering the question as to whether the strict rule of pleadings prescribed by Order-VIII Rule 5 applies to election proceedings with all its rigour, we must bear in mind the fact that the charge like the present is in the nature of a criminal charge and the proceedings in respect of its trial partake of the character of quasi criminal proceedings. It is true that Section 90 of the Act provides that subject to the provisions of this Act and of any Rules made thereunder, every election petition shall be tried by the Tribunal as nearly as may be in accordance with the procedure applicable under the Civil Procedure Code, 1908 to the trial and suits. This provision itself emphasises the fact that the whole of the Civil Procedure Code is not fully applicable. What the section provides is that the proceedings should be tried “as nearly as may be” according to the Code of Civil Procedure. If the contention raised by Mr. Garg is accepted at its face value, it may logically lead to this consequence that if a returned candidate does not controvert the allegations made by the petitioner in his election petition alleging the commission of corrupt practices by the returned candidate a finding

would have to be made in favour of the petitioner without any evidence at all. In other words, the question is: "a corrupt practice prescribed by Section 123(4) of the Act be held to be proved merely on the ground that no specific denial has been made by the returned candidate in his written statement in that behalf?" In considering this point, we cannot overlook the fact that onus to prove essential ingredients of Section 123(4) is on the petitioner, and so it would be for him to prove that the statement is false and that the other requirements of the section are satisfied. Having regard to the nature of corrupt practice which is prescribed by Section 123 (4), we are not prepared to hold that the strict rule of pleadings prescribed by Order-VIII Rule 5 of the Code can be blindly invoked in election proceedings of this type."

With the observations as above, it is not possible to uphold the submission of learned counsel for P that, by evasive denial of R1, it should be held admitted and hence proved that N1 and N2 made the statements and all three, including R1 believed those to be false or did not believe the same to be true.

24. It was submitted by learned counsel Shri Kanetkar that contents of paras No. 11 to 14 of the deposition of P are not challenged during the cross-examination and, therefore, those should be deemed to have been admitted.

It must be said that this would be too general and vague argument. Paras No. 11 to 14 of the Chief Examination are pertaining to the Press Conference, allegedly held by N1 in Room Nos. 106 and 107 of Hotel Samarth on 05-04-2004. In his Chief Examination, P has contended Shri Shinde to be election agent, Bahujan Majur Party having declared support to Shiv Sena candidate and N1 having levelled allegations as contained in para 18 (a) to (g). On reference to cross-examination of P, and more particularly paras No. 2 and 3 thereof, it is evident that all three averments that Bahujan Majur Party had declared support to Shiv Sena candidate, that Shri Shinde was election agent and that N1 levelled allegations as contained in para 18 (a) to (g) of the petition, are suggested to be non-existent and these suggestions are denied by P.

In fact, it may not be out of place to say that the observations of the Supreme Court in the matter of "Jagjeet Singh" (supra), which are reproduced in para 23 above, while rejecting the contention of the learned counsel for P that facts pleaded in the petition, if not specifically denied by the written statement can be deemed to have been admitted, can also be applied by analogy to present argument as well. In this context, it also must be borne in mind that all the while, it is the contention of R1 that she was not present for the said Press Conference and she has

denied any knowledge about the details therein. Reliance was placed by learned counsel on the observations of the Supreme Court in the matter of "Sarvan Singh v. State of Punjab", reported at 2003 (1) SCC 240, which read as under:

"It is rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted."

The observations relied upon are from a case under Terrorists and Disruption Activities (Prevention) Act, 1985. The learned counsel for P could have conveniently argued that since the R.P. Act abliges petitioner to prove his case with the same standard of proof as required in the criminal trial, the ratio should be applicable in the Election Petition. However, cross-examination the P and counsel of the respondent missing some of the statements/averments in the Chief Examination, cannot be equated with the words used by the Hon'ble the Supreme Court, which we have underlined in the quotation hereinabove for the purpose of emphasis i.e. "has declined to avail". On going through the cross-examination of P on behalf of R1, it is difficult to accept that this is a case where R1 has declined to avail an opportunity to put up her case.

If at all the rules of evidence and procedure are to be construed so strictly, the P has admitted, at the beginning of his cross-examination as under:

"I was not personally present at the Press Conference dated 05-04-2004 and election campaign meeting dated 13-04-2004."

Section 60 of the Indian Evidence Act, requires that oral evidence must be direct and from clauses (1) to (3) beginning with the phrase "if it refers to a fact", it is evident that, the witness, who deposes, must have perceived the facts by his own senses i.e. seen with his own eyes, heard with his own ears, tested with his own tongue, smelt with his own nose or sensed with his own skin. What is not perceived by the witness himself, is not the direct evidence and is not admissible on record. Viewed thus, entire evidence of P is inadmissible so far as it relates to what occurred at the press conference dated 05-04-2004 and election campaign meeting dated 13-4-2004. The deposition of P was taken on record only as evidence that he perceived such things to have happened through his party workers and because the party workers were to be examined subsequently. The evidentiary value of chief examination of P is only that of evidence, supporting the evidence of witnesses who give direct account of that evidence and to the extent that those witnesses had narrated particular events having taken place, to P. P's evidence has no value, when it comes to any particular event having

occurred either at press conference dated 5-4-2004 or election campaign meeting dated 13-4-2004. If this aspect is taken into consideration, the initial admission obtained from P in his cross-examination is sufficient to nullify advantage, if any, the P can gain from his averments in the chief examination, which are not based on his personal knowledge.

25. Reliance is placed on the observations of the Hon'ble the Supreme Court in the matter of Vidyadhar Vs. Manikrao, AIR 199 SC 1441, to following effect:-

"Where a party to the suit does not appear into witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, an assumption would arise that the case set up by him, is not correct as has been held in a series of decisions passed by various High Courts and Privy Council, beginning from the decision in Gurbux Singh."

The observation of the Supreme Court are in relation to a civil suit and not in relation to a criminal trial and when standard of proof required by an election petitioner, is that of a criminal trial, it is felt, with due respect, that no reliance could have been placed by learned counsel for P on aforesaid observations in the reported case.

26. In order to propound that the statements, either by N1, in the form of distribution/publication of two pamphlets and copies of caste certificate of P, or by N2 during his speech, are imputations against personal character of P, learned counsel for P has placed reliance upon observations from following reported judgments.

In Kumara Nanada vs. Brij Mohan, reported at AIR 1967 SC 808, reliance was placed on following observations from para 13.

"The question, whether a particular statement with respect to a candidate at an election is a statement of fact or mere expression of opinion would depend upon facts of each case and will have to be judged in the circumstances in which the statement was made in the context of writing in which it appears, in case it is a part of writing."

In the reported matter, it was observed that taking the poem as a whole, there could be no doubt that Respondent was called the greatest of all thieves and that was a clear statement of fact and not a mere expression of opinion.

Case of Inder Lal vs Lal Singh reported at AIR 1962 SC 1156, was relied upon for distinction between criticism of "private character" and "public character". In this matter, allegations in a pamphlet issued by successful candidate

that other candidate was purchaser of the opponents of the Congress, by means of money, were held to be clearly attracting Section 123(4) of the RP Act. The distinction between "public/political character" and a "private character" is discussed in para 13 of the said judgment, thus:

"Though it is clear that the statute wants to make a broad distinction between public and political character on the one hand and private character on the other, it is obvious that a sharp and clear-cut dividing line cannot be drawn to distinguish the one from the other. In discussing the distinction between the private character and the public character, sometimes reference is made to the 'man beneath the politician' and it is said that if a statement of fact affects the man beneath the politician, it touches the private character and if it affects the politician, it does not touch the private character. There may be some false statements of fact which clearly affect the private character of the candidate. If, for instance, it is said that the candidate is a cheat or murderer, there can be no doubt that the statement is in regard to his private character and conduct and so, if the statement is shown to be false, it would undoubtedly be a corrupt practice."

These very observations were referred with approval in the matter of Jagjeet Singh (supra) discussed above.

Considering the ratio laid down in the matter of Jagjeet Singh, the pamphlet, which expressly claimed that the P has deceived the society by a false caste claim, would attract clause in relation to personal character of conduct, as contained in Section 123(4) of the RP Act.

27. For the reasons discussed upto paragraph 20 above, I have already answered some of the questions of fact and felt that the fate of the election petition stands determined by the same. In paragraphs 22 to 26 hereinabove, I have considered remaining questions of fact and for the reasons recorded therein, following conclusions precipitate.

P has not prove beyond reasonable doubt that the caste certificate was fabricated and false one. In fact, it can be said that till 25-4-2004, he himself was not certain about falsity of the caste certificate. As such, it is difficult to arrive at a conclusion that N1 and N2 knew the statements to be false or at least they believed the statement to be not true. Such a knowledge/belief cannot be attributed to them, or to R1, by relying upon Order VIII Rule 5 of the Code of Civil Procedure. Taking into consideration the reported judgments relied upon by learned counsel for P on the point, it will have to be said that the alleged statements are relating to personal character of P and not about his public/

political character, since the statements allege him to have deceived the society by false caste claim.

28. For the findings of facts, as recorded in paragraphs 21 to 27 above and findings as indicated in paragraph 21 on the issues for consideration, election petition fails and is, therefore, dismissed.

Consequently, any declaration regarding N1 or N2, as contemplated by Section 99 (1) (a) (ii) of the Representation of the People Act, 1951, i.e. naming them as the persons guilty of any corrupt practice, cannot be considered to be issued. Notices to them, therefore, shall stand discharged.

Certified copies of this judgment, shall be forwarded to the Election Commission of India and the Hon'ble Speaker of the House of Parliament, as required by Section 103 of the Representation of the People Act.

N.V. DABHOLKAR, Judge

Exh.-101A

**IN THE HIGH COURT OF JUDICATURE AT
BOBMAY BENCH AT AURANGABAD
ORDINARY ORIGINAL CIVIL JURISDICTION**

Election Petition No. 1 of 2004

Laxman Kondiba Dhobale
Age 52 years, Occupation
Social and Political Worker
R/at Savali Housing Society
Taluka Mangalvedha,
District Solapur.

...Petitioner

versus

01. Sow Kalpana Ramesh Narhire
Age 34 years, Occupation
Social and Political Worker
R/at Neeraj Nivas,
Punarwaseet Savargaon,
At Post and Taluka Kallam,
District Osmanabad.
02. Kanifnath Dulha Devkule,
Age 38 years, Occupation
Contractor, R/at Prabhat
Building, Anand Nagar,
at Post Osmanabad,
Taluka and Dist, Osmanabad.
03. Balaji Baburao Tupsundare
Age adult, Occupation
Business, R/at Rajiv Gandhi
Nagar, Yedshi Road, At Post
Osmanabad, Taluka and
District Osmanabad.

04. Kadappa Kondiba Gade,
Age adult, Occup. Pensioner,
R/at G-11 Gokul Apartment,
Naikwadi Plots, Samata Nagar,
At and Post Osmanabad,
Taluka and Dist. Osmanabad.
05. Sandipan Rama Zomabade,
Age Adult, Occup. Business,
R/at Nagnath Road, Buddha
Nagar, At Post Osmanabad.
06. Navnath Dashrath Uplekar,
Age Adult, Occupation;
Agriculturist and Social
Worker R/at Upala (M),
Taluka and Dist. Osmanabad.
07. Vitthal Kundlik Raut,
Age Adult, Occupation;
Agriculturist, R/at Wakadi,
Taluka Paranda, District;
Osmanabad.

...Respondents

Shri S. V. Kanetkar, Advocate, with Shri D.B. Bhange, Advocate, for the Petitioner. Shri A. M. Kanade, Advocate, with Shri B. R. Sontakke Patil, Advocate for Respondent No. 1 Shri V. S. Tanawade, Advocate, for Respondent No. 3, Smt. Vasundhara Rao, Advocate, for Resp. No. 6. Respondents No. 2, 4, 5 & 7 served and absent.

Coram : N. V. Dabholker, J. Reserved on : 04-05-2007.
(Summer vacation from: 07-05-2007 to 03-06-2007) delivered on : 04-06-2007.

ORDER

01. This is an election petition under Section 81 of the Representation of the People Act, 1951 (henceforth referred to as "R. P. Act" for the sake of brevity), calling in question, election of Respondent No. 1 Sow Kalpana Narhire, as a Member of Parliament, from Osmanabad (Maharashtra) Constituency No. 36 (S.C.), at the elections held in April 2004, the result of which was declared on 13-05-2004.

As can be seen from prayer clause (para 39.a of the petition), the petitioner has placed reliance upon Section 100 (1) (b) and Section 100 (1) (d) (ii) of the R. P. Act as the grounds available for declaring election to be void i.e.

"(b). that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent or;

AND

(d). that the result of election, in so far as it concerns a returned candidate, has been materially affected-

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(i) *** **

(ii). by any corrupt practice committed in the interest of the returned candidate by an agent other than his election agent, or”

For the purpose of crystalizing “corrupt practice”, reliance is place on sub-section (4) of Section 123 of R. P. Act which reads :

“(4). The publication by a candidate or his agent or by any other person with the consent of the candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate’s election.” (emphasis added)

Some portions from the relevant provisions are underlined, because those are the portions relied upon with greater emphasis, as will be reflected from factual matrix in brief hereinafter.

The petitioner by prayer clause (b) in paragraph 39 has also sought a declaration under Section 101 that he be declared as duly elected candidate from the said constituency, at the challenged election and in the alternate, for directions to hold fresh election from the said constituency.

02. Factual matrix of the matter can be narrated in brief as follows:

Election in question was declared by a notification dated 24-03-2004. Last date for filing the nominations was 31-3-2004, of which scrutiny was held on 01-04-2004. After deadline for withdrawal of nominations. 05-04-2004 at 3.00 p.m., petitioner and seven respondents were the candidates in fray. Polling took place on 20-04-2004. The result declared after counting on 13-05-2004 revealed following statistics:

Valid votes 6,37,933, Petitioner polled 2,92,787, whereas Respondent No. 1 got 2, 94, 436 votes, Respondent Nos. 2 and 3 respectively polled 10,918 and 11,846 votes. Respondent Nos. 4, 5, 6 and 7 got 5, 785, 4, 960, 7, 374 and 9,827 votes respectively.

It is contended that although Respondent No. 1 was present at the time of scrutiny of nomination papers, neither she nor anyone else raised any objection about nomination papers of the petitioner and more particularly, about his caste Hindu Mang. Petitioner and Respondent No. 1 contested the election as candidates sponsored by National Congress Party (“NCP” for short) and Shiv-Sena, respectively. Respondent No. 3 was sponsored by Bahujan

Samaj Party (“BSP”), whereas Respondent nos. 4 to 7 contested as independents.

Paras 8 to 12 of the petition, trace out the graph of career of petitioner as a political and social worker and he claims to have earned high reputation in Solapur district as well as Marathwada region, in the fields of politics, education and social reforms. He claims to be Hindu-Mang by birth and to have contested all elections by declaring his caste as such, which include two elections to Maharashtra Legislative Assembly in 1991 and 1998.

Copies of quite a good number of certificates are produced along with petition which demonstrate that all the while petitioner claimed to be Hindu-Mang by caste. Exhibit C is a copy of school leaving certificate issued by Gramin Vidya Vikas Vidyalaya, Chapalgaon, Taluka Akkalkot, District Solapur, where petitioner had undergone his secondary education. At Exh. D are two copies of caste certificates dated 11-07-1991 and 06-02-1998 issued by competent authorities and which were used by petitioner at the time of 1991 and 1998 State Legislative Assembly elections. Exh. D-1 is copy of caste certificate dated 01-04-2004 that was obtained from competent authority, used by petitioner while presenting nomination papers at the subject election. Lastly Exh. D-1 is school leaving certificate issued by Zilla Parishad Marathi School, Kurnoor, Tal. Akkalkot, Dist. Solapur dated 01-04-2004. All the certificates show petitioner to be Hindus-Mang. As per petitioner in 36 Osmanabad (S.C.) Parliamentary Constituency 20% voters belong to backward classes and 1/4th of those (about 5% of total voters) are of Mang Community.

At the subject election, Bahujan Majoor Paksha of which Shrikrishna alias Dadasaheb Kshirsagar, resident of Amravati claims to be National President, did not field any candidate of its own, but fully supported candidature of respondent No. 1.

The corrupt practices by which the result of election was materially affected, favourable to respondent No. 1 and prejudicial to election prospects of the petitioner, are in three parts.

On 05-04-2004, Dadasaheb Kshirsagar held a press conference at 8.30 p.m., at Room Nos. 106-107 of Hotel Samarth, Osmanabad. These rooms were booked in the name of Shri Shinde of M/s. Neeraj Gas Agencies for the period 26-03-2004 to 20-04-2004. Shri Shinde is said to be brother-in-law and Chief Election Campaigner of respondent No. 1 and Neeraj Gas Agency to be her business, in the name of her son Neeraj. At the said press conference, Dadasaheb Kshirsagar distributed pamphlets titled as “माण जातीखेतलगे, दोंगी सक्षम देखिक” in which Shri Kshirsagar has made several statements [Para 18 captions (a) to (g) of the petition] of facts, which are false and which he believed to

be false or did not believe to be true, relating to personal character of the petitioner. Along with the said pamphlets, Shri Kshirsagar also distributed to all press reporters present at the conference, several copies of caste certificate showing the caste of the petitioner as Holar (S.C-11) bearing Sr. Nos. 733/95 dated 27-03-1995 allegedly issued by Tahsildar and Executive Magistrate, North Solapur. Thus according to petitioner, by cumulative effect of contents in the pamphlet and xerox copies of caste certificate showing the caste of the petitioner to be Holar, Dadasaheb painted a picture that petitioner is cheating Matang (Mang) community for securing their votes by claiming to be of Mang caste, although he belongs to Holar community. The pamphlet also contains other statements amounting to aspersions against personal character of the petitioner.

On 06-04-2006, said Dadasaheb Kshirsagar published another pamphlet titled as "बाप दाखव नाही तर श्राद्ध कर-जातीवर पूजा दाखवा नाही तर शरणगती पत्करा-मांग जातीचातेलगो, ढोंगी सक्षमण ढोबळे" The said pamphlet contained the same contents as in the pamphlet distributed at the press conference on the earlier day. At the top of this pamphlet it displayed photographs of S/Shri Balasaheb Thakare, Chief of Shiv Sena, Gopinath Mundhe, President of Maharashtra BJP Unit, Eknath Avad, self proclaimed prominent leader of that party and Dadasaheb Kshirsagar, self proclaimed National President of Bahujan Majoor Paksha. During the period 05-04-2004 to 17-04-2004 copies of these pamphlets nearly 35000, were distributed at various places within the constituency i.e. Kallam, Paranda, Osmanabad, Tuljapur, Barshi, Karmala by workers of Shiv-Sena and BJP.

Petition para 18 provides a list of press reporters who attended the press conference dated 05-04-2004, and in para 25 there are two lists one of Shiv-Sena/BJP workers, who distributed the pamphlets and other of supporters of petitioners, who had received those copies.

On 13-04-2004, a public meeting as part of election campaign of the Respondent No. 1 was held, at Naikwadi Nagar, Osmanabad between 6.00 p.m. to 8.30 p.m. Respondent No. 1 was present on the dais, at the said meeting. During the speech delivered by him, Shri Balasaheb Thakare made a statement to followeinge effect.

"He (petitioner) obtained a false certificate of being Matang caste, though he is not Matang by caste and contested election, got entry/berth in Government i.e. Ministry. This is what is his honesty."

In the same meeting Shiv-Sena MLA Shri Shivsharan Birajdar, during his speech, made statement to following effect:-

"He was a witness to the statement by Prof. Dhobale at the Water-Conference that there will be bloodshed on the point of supply of water of Ujni Project."

According to petitioners this false statement was aimed at giving an impression that petitioner was opposing water-supply of said project to Osmanabad.

According to petitioner the details of the press conference dated 06-04-2004 and campaign meeting dated 13-04-2004 got wide publicity in the press. Respondent No. 1 never objected to or dissociated herself with any of these statements by any mode. The statements by all the makers are false, which the makers either believe to be false or do not believe to be true, were related to personal conduct and character of the petitioner and were circulated to prejudice the prospects of petitioner's election and the result of the election was materially affected thereby (petitioner has lost by a margin of 1649 votes). Petitioner also claims to have ascertained through Collector Solapur that no certificate of petitioner belonging to Scheduled Caste Holar, was issued by Tahasildar/Excutive Magistrate, North Solapur on 27-03-1995 under No. 735/95 and to have filed a prosecution against respondent No. 1 Dadasaheb Kshirsagar, Eknath Avad and others u/s 177-G & 499 IPC with Osmanabad City Police Station.

3. Respondent No. 1, who is the returned candidate and thus main contestant of the election petition, has resisted the petition by Written Statement filed at Exh. 17.

Apart from contending that petition is vague and does not contain concise statement of material facts and that it does not disclose any cause of action, a technical defence is raised that respondent No. 1 was not served with a copy of affidavit supporting the allegations of corrupt practises, as referred in proviso to Sec. 83(1) r/w Rule 94-A and form No. 25. According to respondent No. 1, this is non-compliance of Section 81 and hence petition is liable to be dismissed under Section 86 of the R. P. Act. Documents at Exh. C, E-1, E-2, G, I-1 and P are alleged to be illogical and burred and therefore causing an obstacle in filing effective written statement. According to petitioner that is non-compliance of Section 81.

That respondent No. 1 was elected MLA in the year 1995 and 1999. Her credentials were thus proved to the satisfaction of the constituency and she had her own positive merits. She never indulged into character assassination of petitioner.

She herself is "Dhor" by caste and respondent Nos. 2, 3, 5, 6 belong to "Matang" community. Respondent No. 6 Navnath is affiliated to Bahujan Majoor Paksha and was sponsored by the said party. The castewise break-up of the voters in the constituency as pleaded in the petition is said to be incorrect.

Contentions in the petition are said to be marginally concocted and false. The petition and the prosecution are said to be outcome of frustration due to election defeat. It is denied that the result of election in so far it concerns the returned candidate is materially affected by alleged corrupt practice. On the contrary, neither respondent No. 1 nor her election agent has ever consented to commission of alleged corrupt practice. Contentions of the petitioner regarding his contribution in the field of education and co-operation and his having achieved a position of excellence are also denied.

She claims that she neither knows nor is acquainted to Shri Shrikrishna @ Dadasaheb Kshirsagar of Amravati and that she has never met such a person any time in the past. It is also denied that Bahujan Majoor Paksha had supported candidature of respondent No. 1 and on the contrary, it is added, respondent No. 6 was the candidate sponsored by the said party.

Each and every detail, including any relationship with Mr. Shinde, relating to alleged press conference held by Shri Dadasaheb Kshirsagar on 05-04-2004 at Room Nos. 106-107 of Hotel Samarth (para 15 of the petition) is denied in toto.

All contentions in paras. 16 to 19 of the Election Petition are denied in toto. It is contended that, it is untrue and incorrect to state that statements as alleged therein [(para Nos. 18(a) to 18 (g))] were made by said Shri Kshirsagar or he made those statements only with an intention to give benefit to respondent No. 1. In fact, it is contended that, there was no such press conference held on 5-4-2004 to the best of knowledge of respondent No. 1. It is added that, in any case, respondent No. 1 is no way concerned or connected with the alleged press conference or publications at the press conference. Respondent No. 1 does not admit the genuineness and correctness of the documents marked at Exhibits F and G (i. e. pamphlet and xerox copy of the caste certificate allegedly distributed at the said press conference). It is contended that respondent No. 1 learnt about the caste certificate Exhibit G, for the first time only after criminal complaint was filed against her by the petitioner. She denies publication of the documents at Exhibits F and G by respondent No. 1, to be at her instance or to be with her consent.

Contents in paras 22 to 25 are also denied in toto. The allegations relating to the publication and distribution of pamphlets on 6-4-2004 on the letter head of Bahujan Majoor Paksha is denied as false and imaginary. It is also added that respondent No. 1 is unaware about any such pamphlet being distributed or circulated on 6th April 2004. (This has reference to second pamphlets captioned "भाप दाखल नाही तर आहद कर" and bearing photographs of 4 leaders). It is also denied that about 35,000 copies of the pamphlets were distributed by the workers of Shiv Sena and BJP and persons carrying out election campaign on

behalf of respondent No. 1, during the period 5-4-2004 to 17-4-2004. It is contended that names cited in para 25 of the petition two lists containing names of persons who were distributing pamphlets and the supporters of the petitioner who had received the pamphlets) are either of the supporters of the petitioner or the persons who are adversaries of respondent No. 1. In any event, none of them were supporters of the workers of respondent No. 1 at the time of subject election.

Regarding the meeting dated 13th April, 2004, it is contended that the Shiv Sena Chief Balasaheb Thakare is not guilty of committing any corrupt practice as alleged. Assuming the allegations against Shri Balasaheb Thakare to be true, without so admitting; it is contended that Shri Balasaheb Thakare is a person who will not make any statement of fact which is false or which he either believes to be false or does not believe to be true. It is further contended that Shri Balasaheb Thakare has his own reasons and justification for whatever he says and he has his own views and philosophy. In any case, all that Shri Balasaheb Thakare spoke was not with the consent or concurrence of respondent No. 1. Shri Balasaheb Thakare is not an agent of respondent No. 1 and in any case, respondent No. 1 has no control on the public meetings or speeches made therein. It is also added that to the best of knowledge of the respondent No. 1, Shri Balasaheb Thakare did not make any such utterances, as alleged. It is also denied that Shri Thakare made any reference to documents at Exhibits G and F (the pamphlets and the caste certificate). Lastly, it is pleaded that it is not possible to object or register the protest in the public meeting when the speeches are being made and, therefore, the question of dissociation of respondent No. 1 has no relevance, because respondent No. 1 learnt about it for the first time after filing of criminal complaint by the petitioner.

It is also denied that Shiv Sharan Birajdar made any statement as alleged in para 26(A) of the petition. The statement as attributed to Shri Birajdar, it is pleaded, does not amount to any corrupt practice and in any event, respondent No. 1 is not answerable for any such statement if made by said Shri Birajdar, because Shri Birajdar was not an agent of the respondent No. 1 nor respondent No. 1 had given any consent to Shri Birajdar for making any such statement, as alleged.

To sum up, it can be said that all the allegations regarding alleged corrupt practice by Shri Dadasaheb Kashirsagar (publication and distribution of pamphlets and a copy of caste certificate at the press conference dated 5-4-2004 and on 6th April, 2004), Shri Balasaheb Thakare and Shri Shiv Sharan Birajdar (at the election campaign meeting dated 13-4-2004) are denied in toto. It is also tried to be contended that even if those allegations are assumed to be true, the conduct attributed to Shri Balasaheb Thakare and Shri Birajdar does not amount to corrupt practice. It is also stated that none of these

individuals were agents of the respondent No. 1. nor any of them committed the alleged acts with the consent of respondent No.1. It is also denied that the election prospects, either of the petitioner and respondent No.1, were materially affected by any of the alleged corrupt practices.

4. The written statement was filed on 13th January, 2005. Earlier, on 20th December, 2004, and again on 13th January, 2005, respondent No. 1 appears to have filed at Exhibits 11 and 16, applications under Section 86 of the Representation of the People Act, 1951. In fact, those two applications are verbatim same and it can be said in other words, that the same application was filed twice.

It is contended that copy served on the respondent No.1 was not a true and correct copy of the original Election Petition and there is serious discrepancy between the original Election Petition filed in the court and copy of it supplied to respondent No.1. Respondent No.1 is not supplied a copy of the affidavit referred in para.34 of the Election Petition, i.e. affidavit as contemplated by proviso to Section 83(1) of the R. P. Act, supporting allegations of corrupt practices and, therefore, there is non-compliance of Section 83(1) which is fatal to the petition.

It is added that supply of incorrect copy has caused prejudice in the defence of respondent No.1 and, therefore, the Election Petition is prayed to be dismissed at the threshold in view of Section 86 of the R.P. Act. Para.7 of the application also contains some argumentative details aimed at demonstrating as to how those details indicate that copy supplied to respondent No. 1 must not have been accompanied by a copy of the affidavit of the petitioner.

5. Respondent Nos. 2,4,5 and 7 have remained absent throughout, inspite of service. As already indicated hereinabove, respondent No.1 has contested the Election Petition with full strength. Respondent Nos. 3 and 6 have also filed brief written statements, although during the course of oral evidence they have shown an approach of an observer by not cross-examining any of the witnesses examined either on behalf of the petitioner or on behalf of the respondent No.1. By his written statement at Exhibit 20, the respondent No.3 Balaji has supported all the petition averments. Written statement of respondent No.6 Navnath is still shorter than that of respondent No.3. He has refused to comment on paras. 1 to 14 of the petition, but has supported the allegations in the petition regarding press conference held by Shri Dadasaheb Kshirsagar and presence of Shri Balasaheb Thakare in the meeting held on 13-4-2004 about which, he read in the newspapers on the next date. He has also opined that petitioner's chances of election were adversely affected by the propaganda regarding his caste.

6. It appears that initially the Election Petition was before brother Judge Shri V.G. Munshi (now retired) who

ordered 'Not before me' on 3rd August, 2004 itself. Another brother Judge (Shri P.B. Gaikwad, J.) on 14-9-2004 ordered notices to respondents returnable on 3-11-2004. On 3-11-2004, 24-11-2004, 20-12-2004, respondent Nos. 1,3 and 6 prayed for adjournments to file written statement, which were granted. On 20-12-2004, petitioner was directed to file say also on the application by respondent No. 1 under section 86 of the R.P. Act, praying for dismissal of the Election Petition on preliminary issue. Copy of the petition served upon the respondent No.1, was kept in safe custody, at the request of respondent No.1 by order dated 20-12-2004. It appears that the petitioner filed say on the application under Section 86 of the R.P. Act on 30-3-2005. The matter was thereafter adjourned to 8-4-2005, 2-5-2005, 17-6-2005, 8-7-2005 and 15-7-2005. On that date, written statements were filed by respondent Nos. 3 and 6. Respondent No. 1 has filed Written Statement (Exh.17) on 13-1-2005.

Thereafter, the matter was adjourned to 5-8-2005, 19-8-2005 and 16-9-2005. It appears that on 19th August, 2005, respondent No.1 had filed application (Exhibit 24) praying that issue No.1 as framed, may be considered as a preliminary issue. After considering the say filed by the petitioner (Exhibit 25) on 2-9-2005, my learned predecessor ordered on 16th November, 2005 that issue No.1 is to be considered after recording of oral and documentary evidence along with other issues. And with the consent of the parties the matter was fixed for recording evidence on 21-10-2005.

Issues framed by my learned brother Judge (Shri P.B. Gaikwad, J.) on 22-7-2005 are on record at Exhibit 22. (It appears that petitioner and respondent No.1 submitted draft issues on 14th July, 2005 and 15th July, 2005 respectively-unexhibited). Petitioner has framed 51 draft issues whereas respondent No.1 has framed 4.(But, regarding the aspect of issues, I may (refer to the same a little latter).

On 21-10-2005, my brother Judge, P.B. Gaikwad, J., recorded "Not before me". It seems that subsequently, the matter was allotted to brother S.B. Deshmukh, J., who also recorded "Not before me" on 20-1-2006, whereafter, the matter was assigned to me as per order of Honourable the Chief Justice, communicated to the Registry of this Bench vide Communication dated 1-3-2006. The advocates of the petitioner and respondent No.1 appeared before me for the first time on 13th April, 2006 at 2.30 p.m. in my chamber and advocate for respondent No.1 prayed for stay of the Election Petition pending disposal of the Special Leave Petition bearing No. (C) CC 12511/2005 preferred by his client before Honourable the Supreme Court, thereby challenging the order dated 16th September, 2006, wherein my learned predecessor had ruled that Issue No.1 would be heard and decided together with other issues and not as a preliminary issue. Since the copy of order produced by advocate Shri Sontakke Patil indicated that the

Honourable Apex Court was pleased to condone the delay and issue notices, but no stay was granted, strong objection was raised on behalf of petitioner against stay of the election petition, obviously because with the passage of time the election petition would stand frustrated as the term of the respondent No.1 would come to an end some time in the year 2009. By rejecting the application for stay, I had fixed the Election Petition on 6th June, 2006.

Recording of evidence was commenced on 21st July, 2006 with deposition of petitioner. Petitioner in all examined 16 witnesses and closed the evidence by a pursis filed at Exhibit 78 on 7-2-2007. Respondent No.1 has examined as many as 10 witnesses, including the deposition of respondent No.1 as RW-5; between 26-2-2007 to 18-4-2007. (The matter could not be proceeded day-to-day because lawyers representing petitioner and respondent No.1, the main contesting parties, are lawyers practicing at Pune and Delhi, respectively). No oral evidence is laid by or on behalf of respondent Nos. 3 and 6. The arguments were submitted and heard on 24th and 25th April, 2007 and 3rd and 4th May, 2007, under the belief that those were for final disposal of the Election Petition.

7. I have conscientiously used the words that the arguments were heard under the belief that those were submitted and heard for final disposal of the election petition. This is because, subsequently, we (the court and the lawyers) have realised that we have not reached a stage of disposal of election petition by final verdict with a reasoned judgment. This was realised only when Advocate Shri Kanade for Respondent No. 1 at the fag end of his arguments, who advanced his submissions only after submissions of Advocate for petitioner were heard nearly for 2-1/2 days, referred to Sections 98 and 99 of the R.P. Act. It can be said with certainty that neither of lawyers was conscious about incompleteness of the entire trial that was going on since 21-7-2006. This is because, neither of the lawyers ever invited this court to issue notices to Sarvashree Dadasaheb Kshirsagar, Balasaheb Thakare and Shivsharan Birajdar, although petition alleges these three individuals have indulged into "corrupt practices" as defined by Section 123(4) of the R.P. Act, either with the consent of or committed in the interests of the returned candidate, thereby materially affecting election result and thus attracting either Section 100(1) (b) or Section 100(1) (d) (ii) of the R.P. Act. It is the peculiarity of this election petition that it does not allege the returned candidate/ Respondent No.1 herself having indulged into commission of any corrupt practices, but third persons are alleged to have indulged into such practices in the interests of Respondent No.1. Compliance of Section 99 has, therefore, more significance in the present case. It is not possible to ignore allegations regarding corrupt practices as against other persons and decide the election petition on the basis of corrupt practices alleged to have been committed by the returned candidate herself.

The petitioner side went ahead by leading evidence of as many as 16 witnesses. Respondent No. 1 also examined ten witnesses. Earlier, twice request was pressed into service that issue No.1 may be heard and decided as preliminary issue and election petition may be dismissed under Section 86 (1) of the R.P. Act. But, neither party moved this court, by an application, either written or oral; to proceed with the recording of evidence, only after notices to three individuals who allegedly indulged into corrupt practices either with the consent of or in the interests of the returned candidate.

Reliance was placed by learned counsel for the petitioner, upon the judgment of the Hon'ble Apex Court in the matter of Manohar Joshi vs. Nitin Bhaurao Patil and another, 1996 (1) scc 169, which has interpreted the purport of Sections 98 and 99 of the R.P. Act but for different purposes. Learned Advocate Shri Kanetkar relied upon the said judgment for the purpose of distinction between Section 100 (1) (b) and Section 100(1) (d) (ii), as is evident from the fact that he desired this court to follow the guidelines as discussed in paragraphs 38 to 40. In fact, paragraphs 38 to 43 of the judgment discuss Section 100 and distinction between clauses (1) (b) and (1) (d) (ii). The first one requires pleading and proof of consent by the returned candidate to the alleged action amounting to corrupt practices committed by his election agent or by any other person. As against this, clause (1) (d) (ii) may not require proof of consent, but in case of corrupt practices committed in the interests of returned candidate by an agent (not the election agent), the petitioner will have to demonstrate that the result of the election, so far as it concerns the returned candidate, has been materially affected by such corrupt practices. From the manner in which reliance is placed by learned counsel for the petitioner on the part of the reported judgment, it is evident that he was unmindful of non-compliance of Section 99 by this court till that stage. Probably, taking a cue from other portion of the judgment that was not relied upon by the learned counsel for the petitioner, learned Advocate Shri Kanade ended his arguments by referring to Sections 98 and 99 and remind this court that it will have to name the persons who are held guilty of having indulged into corrupt practices and before doing so, the court will have to issue notices to those persons.

8. Sections 98 and 99 of the R.P. Act read as follows:

"98. Decision of the High Court,—At the conclusion of the trial of an election petition, the High Court shall make an order—

- (a) dismissing the election petition; or
- (b) declaring the election of all or any of the returned candidates to be void, or
- (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.

99. Other orders to be made by the High Court.—(1) At the time of making an order under Section 98 the High Court shall also an order—

(a) Where any charge is made in the petition of any corrupt practice having been committed at the election, recording—

(i) a finding whether any corrupt practice has or has not been proved to have been committed at the election, and the nature of that corrupt practice; and

(ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice; and

(b) fixing the total amount of costs payable and specifying the persons by and to whom costs shall be paid;

Provided that a person who is not a party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless—

(a) he has been given notice to appear before the High Court and to show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him, of calling evidence in his defence and of being heard.”

It must be said that by reading Sections 98 and 99 together and if one does not realise importance of proviso to section 99(1), one gets confused and such a confused action and possibility of such confused action is discussed by the Hon'ble Apex Court in the later half of paragraph 58 of the judgment in the matter of Manohar Joshi (supra). Eventually, discussion in paragraphs 51 to 60 of the said judgment regarding combined effect of Sections 98 and 99 of the R.P. Act, makes the position clear. In the reported matter, apart from returned candidate Shri Manohar Joshi, allegations of corrupt practices were raised also against Sarvashree Balasaheb Thakare and Pramod Mahajan to whom notices under Sections 99 of the R.P. Act were not issued. The important excerpts from paragraphs 54 to 59 may usefully be reproduced.

“54. The opening words in Section 98 are “At the conclusion of the trial of an election petition the High Court shall make an order.” There can be no doubt that Section 98 contemplates the making of an order there under in the decision of the High Court rendered “at the conclusion of the trial of an election petition”.....

There is nothing in Section 98 to permit the High Court to decide the election petition piecemeal and to declare the election of any returned candidate to be void at an intermediate stage of the trial when any part of the trial remains to be concluded.”

“55. Sub-section (1) of Section 99 begins with the words “At the time of making an order under Section 98 the High Court shall also make an order” of the kind mentioned in clauses (a) and (b) therein. It is amply clear that the order which can be made under clauses (a) and (b) of sub-section (1) of Section 99 is required to be made “at the time of making an order under Section 98”. As earlier indicated, an order under Section 98 can be made only at the conclusion of the trial. There can be no doubt that the order which can be made under sub-section (1) of Section 99 has, therefore, to be made only at the conclusions of the trial of an election petition in the decisions of the High Court made by disposing of the election petition in one of the modes prescribed in clauses (a), (b) and (c) of Section 98. This alone is sufficient to indicate that the requirement of Section 99 is to be completed during the trial of the election petition and the final order under Section 99 has to be made in the decisions of the High Court rendered under Section 98 at the conclusion of the trial of the election petition.”

57.

There is no room for taking the view that the view that trial of the election petition for declaring the election of the returned candidate to be void under Section 98 can be concluded first and then proceedings under Section 99 commenced for the purpose of deciding whether any other person is also to be named as being guilty of the corrupt practice of which the returned candidate has earlier been held guilty leading to his election being declared void.” The discussion is concluded in paragraph 58 thus;

“ The rationale is obvious. Where the returned candidate is alleged to be guilty of a corrupt practice in the commission of which any other person has participated with him or the candidate is to be held vicariously liable for a corrupt practice committed by any other person with his consent, a final verdict on that question can be rendered only at the end of the trial, at one time, after the enquiry contemplated under Section 99 against the other person, after notice to him, has also been concluded. Particularly, in a case where liability is fastened on the candidate vicariously for the act of another person, unless that act is found proved against the doer of that act, the question of recording a finding on that basis against the returned candidate cannot arise.

(emphasis added)

The confusion that is likely to arise, if the combined effect of Sections 98 and 99 is not read as above, is also indicated in remaining part of paragraph 58, by the Hon'ble the Supreme Court in following words;

"Viewed differently, if the final verdict has already been rendered against the returned candidate in such a case, the opportunity contemplated by Section 99 by an inquiry after notice to the other person is futile since the verdict has already been given. On the other hand, if the question is treated as open, a conflicting verdict after inquiry under Section 99 in favour of the notice would lead to an absurdity which could not be attributed to the legislature."

(emphasis added).

09 In fact, till the time we stood enlightened by the observations of the Supreme Court quoted hereinabove, Section 99 was being read by us in a confused manner and as possibly leading to the result, as stated in the last quotation hereinabove. This was result of clause (b) of proviso to Section 99 (1) which reads;

"(b) if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the High Court and has given evidence against him, of calling evidence in his defence and of being heard."
(emphasis added).

The part of the clause highlighted for the purpose emphasis, keeps one under the belief of possibility of duel trial and apprehension of second result conflicting with the first one. One cannot avoid feeling that the effect sought to be achieved by proviso to sub-section (1) of Section 99, also could have been achieved by insertion of words "or person" in Section 82 (b) of the R.P. Act, pertaining to parties of the petition. Said clause (b) of Section 82 reads thus;

"82. Parties of the petition.- A petitioner shall join as respondents to his petition

(a) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(b) any other candidate (or person) against whom allegations of any corrupt practice are made in the petition.
" (words in bracket with emphasis, added)

10. Be that as it may. Although we have travelled some distance in a wrong direction, fortunately we have not reached the destination by wrong route and there is still room for rectification which ought to be done in the

interest of justice.

In the matter of Moreshwar Save v. Dwarkadas Y. Pathrikar (1996) 1 S.C.C. 394 (another decision of the Supreme Court in another appeal under Section 116(A) of the R.P. Act against another decision of the Bombay High Court, as in the case of Manohar Joshi), the Apex Court followed the decision in the matter of Manohar Joshi and held that the defect of want of notice to party leaders, who had delivered alleged speeches is alone sufficient to set aside the order holding the candidate guilty of corrupt practices.

In the matter of Moreshwar Save, the Supreme Court allowed the appeal and set aside the impugned judgment of the Bombay High Court in the election petition which had declared the election of appellant Moreshwar Save to be void, by observing in paragraphs 8 and 9 that there is no clear pleading or finding of appellant's consent which is constituent part of the corrupt practice (it was an election petition based only on the grounds contained in Section 100 (1) (b) of the R.P. Act) and there is nothing pleaded or proved in the alleged speeches of Manohar Joshi and Balasaheb Thakare to attribute corrupt practices under sub-section (3) (A) of Section 123 of the R.P. Act. Yet, regarding course to be adopted in such a situation where High Court, as an Election Tribunal, has failed to comply with requirement of Section 99, the Supreme Court, in the matter of Moreshwar Save, observed thus;

"..... Ordinarily, the matter may require to be remanded for a fresh decision of the election petition after notice to the persons to be named for commission of the corrupt practice in accordance with Section 99, or the decision of this appeal may be deferred and in the meantime notice may be given under Section 99 to those persons and after the requisite inquiry by the High Court its finding in respect of those persons be called for deciding the case against the (37) candidate and the notices at one time while deciding the appeal in this Court."

Such a course was not adopted and the appeal was allowed and election petition was dismissed for the reasons briefly referred hereinabove.

In the matter at hands, although arguments were submitted and heard under the belief that the election petition is concluded, in view of the cumulative effect of Sections 98 and 99 as laid down by the Hon'ble the Supreme Court, trial cannot be treated as concluded without notices to the individuals (who are not returned candidates) and opportunity of opposing allegations being given to them. That is why, I have said earlier that there is room to rectify the error. In stead of writing a judgment, thereby disposing of election petition by either type of order as contemplated by clauses (a) to (c) of Section 98, it is necessary to issue notices to Sarvashree Dadasaheb Kshirsagar, Balasaheb Thakare and Shivsharan Birajdar,

since they are the persons allegedly indulged into commission of corrupt practices either with the consent of or in the interests of Respondent No.1.

11. Although petitioner has approached this court by alleging indulgence into corrupt practices by three individuals, namely, Dadasaheb Kshirsagar, Balsaheb Thakarey and Shivsharan Birajdar and as a result of discussion hereinabove and more particularly the requirement of compliance of section 99 of the R.P. Act, I have arrived at a conclusion that it is necessary to issue notices to those individuals (who are not party to the election petition) against whom the petition has raised allegations of indulgence into corrupt practices, it is felt that no such notice is necessary to be issued as against Shri Shivsharan Birajdar. This is because, even if the utterances attributed to Shri Shivsharan Birajdar are presumed to be true for the sake of arguments, those do not appear to attract Section 123 (4) of the R.P. Act. The said provision, which is relied upon by the petitioner for the purpose of alleging commission of corrupt practices by the three individuals, requires the maker of the statement to make a false statement in relation to personal character or conduct of the candidate. In the record, there are enough indications that the statement attributed to Shri Shivsharan Birajdar is not relating to personal character or conduct of the petitioner.

Referring to paragraph 26-A of the petition, wherein the utterances by Shri Birajdar are reproduced, it is said that Shri Birajdar claimed to be a witness to the utterances by the petitioner at Water Conference (पाणी परिषद्). The petitioner is said to have expressed that in case water from Ujani project is supplied to Marathwada, there will be bloodshed. It can be visualised that the petitioner could not have attended the water conference in his personal or private capacity. It was his character as M.L.A. which enabled him to attend the said conference and express his views, if any. In paragraph 21 of his deposition, the petitioner has stated about the speech delivered by Shri Birajdar at the campaign meeting dated 13-4-2004 and I quote;

“Shri Birajdar made a statement during his speech that he is a Member Legislative Assembly and I (petitioner) had said in the assembly that, if canal water is provided to Marathwada, that will cause bloodshed. I have reproduced the objectionable part from the speech of Birajdar in paragraph 26-A of the petition”

The deposition of the petitioner confirms that the expression attributed to him or rather his attitude of opposing water supply to Marathwada, attributed to him by claiming that he had so vocally expressed, is attributed to him while he was speaking as M.L.A. and, therefore, the statement, even if false, is not a statement regarding personal conduct or character of the petitioner. It is a statement regarding official character of the petitioner as

M.L.A. Hence, even if all these allegations are held to be true for the sake of arguments, those do not attract Section 123(4) of the R.P. Act.

Witnesses Yuvraj Shinde and Dili Telang are said to have attended the said meeting dated 13-4-2004 and these two are examined as W. 13 (Exh. 73) and W 15 (Exh.75). Deposition of both these witnesses about the speech by Shri Birajdar, is cryptic. Yuvraj Shinde has said;

“Shivsharan Patil said that Shri Dhobale will not allow water from Ujani project for Marathwada. He said that Shri Dhobale was saying that he would not allow a drop of water from Ujani project for Marathwada and if it was so attempted, there will be blood flood.”

“PW- 15 Dili has said;

“Shivsharan Birajdar referred to the issue of Ujani project and he quoted the petitioner to have said that in case water from Ujani project is given to Marathwada there would be flood of blood.”

The deposition of these two witnesses does not reflect the details of occasion at which the petitioner allegedly made such a statement nor it throws light upon character held by the petitioner on that occasion. But, according to the petitioner himself, such a speech was attributed to him by Shri Birajdar as a Member of Legislative Assembly, may be at the water conference.

Opening part of paragraph 26-A of the petition tried to attribute similar speech as made by Shri Balasaheb Thakare, also to Shri Shivsharan Birajdar, by following words.

“The petitioner states that in the said meeting Shiv Sena M.L.A. Shivsharan Birajdar (Patil) also spoke as stated hereinabove.”

Paragraph 26 earlier, is pertaining to speech delivered by Shri Balasaheb Thakare and objectionable part therein. Eventually, I have benefit of reading the evidence led by the petitioner on all the issues and from the excerpts of deposition of the petitioner and two witnesses Yuvraj and Dilip, none of them has claimed Shri Birajdar to have repeated the speech as delivered by Shri Balasaheb Thakare.

Thus, pleadings in the petition, as also evidence led by the petitioner, does not make out a case of indulgence into corrupt practices as defined by Section 123 (4) of the R.P. Act, by Shri Birajdar and hence compliance of Section 99 as against Shri Birajdar is uncalled for.

12. Having gone through the issues framed by my learned brother at Exhibit 22, without commenting in details, I have felt those to be not happily/properly worded and hence, I deem it proper to recast, rather redraft, the issues as follows. It must be said that the issues are redrafted and not recast. This is because, by redrafting the issues, there is no change in the burden of proof which is still kept upon

the shoulders of the petitioner. This being the election petition alleging indulgence into corrupt practices by returned candidate or by any other person for returned candidate, it is settled legal position that burden of proof lies on the petitioner and due care has been taken to ensure that the burden of proof is kept upon the petitioner while redrafting the issues, except issue No. 4 which arises because of preliminary objection by Respondent No. 1. I, therefore, propose to substitute following issues at Exhibit 22, in stead of the issues framed by my predecessor.

ISSUES

(1) Does petitioner prove that Bahujan Majoor Party, of which krushna alias Srikrishna alias Dadasaheb Kshirsagar is National President, had openly and fully supported Respondent No. 1, without fielding any candidate of the said party in the subject election?

(2) Does petitioner prove that any corrupt practice within the purview of Section 123 (4) of the R.P. Act, was committed at the subject election by Respondent No.1, or her election agent or by any other person :—

(a) by Dadasaheb Kshirsagar, by holding a press conference on 5-4-2004 at 8.30 P.M. at room Nos. 105 and 106 of Hotel Samarath, Osmanabad and distributing a pamphlet captioned “मांग जातीचा तेलगी दोगी लक्ष्मण दोलक” and xerox copies of a caste certificate showing caste of the petitioner as Holar (SC-11), thus making false statements in relation to personal character and conduct of the petitioner (as containing in paragraphs 18 (a) to (g) of the petition) calculated to prejudice the election prospects of the petitioner ?

(b) by Dadasaheb Kshirsagar, by publishing another pamphlet captioned on “बाप दाखन नाहीतर आर कर” 6-4-2004, containing false statements same as in earlier pamphlet- paras 18 (a) to (g) of the petition, in relation to personal character or conduct of the petitioner calculated to prejudice election prospects of the petitioner ?

(c) by workers of Bharatiya Janta Party and Shiv Sena distributing these pamphlets between 6-4-2004 to 17-4-2004 at various places ?

(d) by Shiv Sena Chief Shri Balasaheb Thakare, by making a speech in the public meeting (election campaign) held on 13-4-2004 between 6 p.m. to 8.30 p.m. at Naikwadi Nagar, Osmanabad and during the speech making a false statement as reproduced in paragraph 26 of the petition, relating to personal character and conduct of the petitioner, calculated to prejudice the petitioner's election prospects ?

(e) by Shiv Sena M.L.A. Shri Shivsharan Birajdar (Patil) at public meeting dated 13-4-2004 making a false statement as reproduced in paragraph 26-A of the petition, in relation to personal character and conduct of the petitioner and calculated to prejudice election prospects of the petitioner ?

(3) Does petitioner prove that the alleged false statements against personal character and conduct of the petitioner were made by Sarvashree Dadasaheb Kshirsagar, Balasaheb Thakare and Shivsharan Birajdar with the consent of Respondent No.1 or her election agent ?

(4) Does petitioner prove that Sarvashree Kshirsagar, Thakare and Birajdar indulged into alleged corrupt practice in the interest of returned candidate (Respondent No.1) and that the result of the election, insofar as it concerns Respondent No.1, has been materially affected, thereby ?

(5) Whether the petition suffers from non-compliance of Section 81 (3) of the R.P. Act ? If yes, what effect ?

(6) Is petitioner entitled to a declaration regarding election of Respondent No. 1 at the subject election being null and void ?

(7) Is petitioner entitled to be declared as a candidate duly elected at the subject election ?

(8) What order ?

It is needless to say that for the reasons discussed in paragraph 11 herein above, issue No.2 (e) is required to be answered in the negative and that is why it is decided not to issue notice under Section 99 of the R.P. Act to Shri Shivsharan Birajdar.

13. In the light of applications (Exh.11 and 16) and contents in paragraphs 1 (A) to 1 (D) of the written Statement (Exh.17), my learned predecessor has framed issue No.1 as follows:—

“ Whether election petition is (not) maintainable on account of non compliance of Sections 81 and 83 of the Representation of People Act, 1951, as contended by Respondent No.1 ? ”

Even while redrafting the issues, I have maintained the same in slightly modified form.

“ Whether the petition suffers from non compliance of Section 81 (3) of the Representation of People Act ? If yes, what effect ? ”

While redrafting the issue, I have conscientiously deleted plea of non compliance of Section 83 from the same. This is in view of the fact that Section 86 of the R.P. Act does not entail dismissal of election petition, which does not comply with requirement of Section 83, although it

In the written statement (Exh.17), Respondent No.1 has raised another couple of technical pleas in addition to technical plea as raised by applications, Exh.11 and 16. In

paragraph 1 (A) of the written statement, it is contended that the petition does not contain concise statement of material facts. In paragraph 1(B), it is contended that the petition does not disclose any triable issue and any cause of action. It must be said that both these contentions are without any material to support the same, even after nearly fulfilled trial of the election petition.

Having gone through the election petition, one can certainly make out what is the case of the petitioner. It is his contention that, by distribution of pamphlet and a copy of caste certificate at the press conference dated 5-4-2004 by Dadasaheb Kshirsagar, as also by distribution of copies of couple of pamphlets all over the constituency by Shiv Sena and B.J.P. leaders, it was tried to be painted that the petitioner is claiming to be 'Mang' by caste, although he does not belong to the said caste. Similar attempt is attributed to Shri Balasaheb Thakre by reference to his alleged speech and the conduct of displaying a copy of caste certificate wherein the petitioner is shown as 'Holar' by caste. Petition also contains details of alleged linkage between Dadasaheb Kshirsagar and respondent No.1 It is thus not possible to say that the petition does not contain concise statement of material facts of that it does not set forth full particulars of corrupt practice alleged. The contentions in paragraphs 1 (A) and 1 (B) of the written statement therefore, are not sustainable. Otherwise also, non-compliance of Section 83 does not entail dismissal of the election petition, but court would have been required to invite the petitioner to remove deficiencies. I should stand fortified in making such observations, in view of the reasons discussed by the Hon'ble the Apex Court in paragraph 43 in the matter of T.M.Jacob vsC Poulse, AIR 1999 S.C.1359.

“
.....
.....

That apart, to our mind, the Legislative intent appears to be quite clear, since it divides violation into two classes—those violations which would entail dismissal of the election petition under Section 86 (1) of the Act like non-compliance with Section 81 (3) and those violations which attract Section 83 (1) of the Act i.e. non-compliance with the provisions of Section 83. It is only violation of Section 81 of the Act which can attract the application of the doctrine of substantial compliance as expounded in *Murarka Radhey Shyam* (AIR 1964 SC 1545) and *Ch. Subbarao's* cases (AIR 1964 SC 1027). The defect of the type provided in Section 83 of the Act, on the other hand, can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure.....

The defect pleaded in paragraph 1 (A) of the Written Statement, if at all, could have attracted Section 83 (1) (2),

those would have been required to be removed by the petitioner but would not have entailed dismissal of election petition as under Section 86 (1) of the R.P.Act.

The contention in paragraph 1 (B) of the written Statement that the election petition does not disclose any cause of action has come as a bald contention without any supporting details. It is undisputed that the petitioner and Respondent No.1 contested at the Parliamentary election wherein petitioner was defeated by a margin of 1649 votes. It is the contention of the petitioner that he belongs to scheduled caste 'Mang' and that the publications were made in the interests of Respondent No.1 that he does not belong to caste 'Mang.' It is his contention that the persons interested in the success of Respondent No.1 tried to paint a picture as if the petitioner was playing a fraud on the voters of the community. Taking into consideration above tenor of the election petition, the contention raised by Respondent No.1 that the petition makes out no cause of action, cannot be upheld.

This leaves only one ground available to Respondent No.1 to plead non-compliance of Section 81 (3) and, therefore, pray for dismissal of election petition under Section 86 (1) of the R.P.Act i.e. non-supply of copy of affidavit as required by Rule 94 (A) in form No.25 of Conduct of Election Rules 1961 and implied contention that copies submitted along with petition were incomplete i.e. not accompanied by the copy of the affidavit. We must say here that it is not the case of Respondent No.1 that petition was presented without affidavit as required. Such a contention also could not have been sustainable in view of the fact that the affidavit is incorporated in the index at serial No5, the last, although it is not paged and no page numbers are inserted against entry 'affidavit' in the index. No doubt, in the petition presented, annexure Q ends at page 135 which is followed by Vakalatnama (Exh2), memo of address (Exh.3) and then affidavit which runs into three pages. But the affidavit is sworn on 28th June 2004 before the Registrar (J) of this court and the petition is also presented on 28th June 2004 which circumstance creates a strong probability that the petition was presented accompanied by affidavit sworn just at the time of presentation, before the Registrar (Judicial). Naturally, the points to be considered are whether Respondent No.1 proves that she was not supplied copy of this affidavit under Rule 94 (A) when she was served documents purporting to be copy of petition, along with notice and if she was not, does it lead to an inference that the copies tendered along with petition were incomplete and whether such a defect attracts Section 81 (3), thereby entailing dismissal of the election petition under Section 86 (1) of the R.P.Act.

During the course of arguments Advocate Shri Kanade for Respondent No.1 was very brief. He has pointed out that what was served upon Respondent No.1 is tendered

in the office and kept in the safe custody of the Registrar. According to him that bunch of papers establishes Respondent No. 1 having received incomplete copy of the petition i.e. without copy of affidavit under Rule 94 (A). In spite of application (Exh. 11) dated 20-12-2004, the petitioner has made no attempt to cure the defect, may be by supply of a copy of the affidavit to Respondent No. 1. Respondent No. 1, according to learned counsel, is, therefore, prejudiced in her defence, as she could not file complete written statement without copy of the affidavit.

Advocate Shri Kanetkar, on the contrary, argued that non-supply of copy of affidavit itself cannot be held proved because, applications (Exh. 11 or Exh. 16) raising objection to the maintainability of the election petition on the ground of non-compliance of Section 81(3) because copy of affidavit was not served, have come at a belated stage. According to Advocate Shri Kanetkar on 3-11-2004 and 24-11-2004 Respondent No. 1 did pray for time to file written statement but no grievance was raised on either of these two dates regarding non-supply of copy of affidavit and, therefore, according to him, such a plea is an after thought.

It is a matter of record that notice to Respondents was ordered on 14-9-2004 returnable on 3-11-2004. On 3-11-2004, advocate Shri M.S. Patil had appeared for Respondent No. 1 and had requested for time to file written statement. On 24-11-2004, Advocate Shri B.R. Sontakke Patil was present on behalf of Respondent No. 1 and on that day also, time to file written statement was prayed for. Only thereafter, on the third date i.e. 20-12-2004, application (Exh. 11) raising preliminary objection to the sustainability of election petition was filed. Advocate Shri Kanetkar also pointed out that it was only on 14-1-2005 that Respondent No. 1 tendered a copy of the petition served upon her, before this court for being kept in the safe custody which application was allowed by this court on 2-5-2005. Thus, Advocate Shri Kanetkar submitted that the plea of Respondent No. 1 not having received copy of affidavit may not be believed to be true. He also referred to the deposition of Respondent No. 1 (Exh. 91) for the purpose, and pointed out that Respondent No. 1, during her deposition, does not say anything about non-receipt of copy of affidavit with the notice. He has also placed reliance on few judicial pronouncements while advancing his submissions about challenge to maintainability of the election petition.

Chandrakant Chodankar v Dayanand Mandrakar, 2005 AIR SCW 19 was referred by learned counsel for the Petitioner with emphasis on placitums 'C' and 'D'. Placitum 'C' based on paragraphs 37, 76 and 78 of the judgment lays down that, no signature of the petitioner after prayer clause and verification, omission to stamp in respect of swearing of affidavit, omission to sign an affidavit accompanying the petition, are not the defects vital in nature when each and every page/copy of the petition was attested by the

petitioner. With due respect to the learned counsel, these observations can render no assistance to the present petitioner, because the defect, which is relied upon by Respondent No. 1 in our case as non-compliance of Section 81 (3), is totally different than the defects referred to in the judgment relied upon.

Note 'D' to some extent, is useful for the petitioner, to rely upon. It seems that there was an objection regarding non-filing of requisite number of copies of the petition. But, there was certificate by registry that requisite number of copies had been duly filed and the petition was in order, before directing registration of the petition. It is observed that onus is upon Respondent to rebut the presumption. The contents in paragraphs 85 upon which head note is based, read as follows :

" In presence of a certificate of the registry of the High Court that there was no defect in the writ petition which would certainly raise a presumption, it would be for the respondent to rebut that presumption and discharge his initial burden. In this case admittedly, note of the Registry of the High Court clearly says that requisite number of copies had been duly filed and the election petition was in order. That being the position, we are unable to agree with Mr. Thali as well as the High Court that the onus was on the election petitioners to prove that true copies of the election petitions were duly filed by him."

The judgment of the High Court, rejecting the election petition for non-filing of requisite number of copies was, therefore, set aside.

In paragraph 22 of the said judgment, the Supreme Court has observed;

" It is now well-settled that the statutory requirements of Sections 81 and 83 would be met if substantial compliance thereof is made."

In paragraph 23, the Court also referred to observations of a Constitution Bench of the Supreme Court in the matter of Murarka Radhey Shyam Ram Kumar V Roop Singh Rathode and others [AIR 1964 SCC 1545], interpreting sub-section (3) of Section 81, wherein the Constitution Bench observed :

" expression 'copy' contained therein would not mean absolutely exact copy, but would mean that the 'copy' shall be so true that nobody can by any possibility misunderstand it.

The test whether the copy is a true one is whether any variation from the original is calculated to mislead an ordinary person."

In paragraph 25 of the judgment, the Supreme Court has referred to observations of another Constitution Bench

of the Supreme Court in the matter of T.M. Jacob Vs. CPoulou and others [(1999) 4 SCC 274], which may usefully be reproduced hereinbelow.

“ In our opinion, it is not every minor variation in form but only a vital defect in substance which can lead to a finding of non-compliance with the provisions of Section 81 (3) of the Act with the consequences under Section 86 (1) to follow the weight of authority clearly indicates that a certain amount of flexibility is envisaged while and impermissible deviation from the original may entail the dismissal of an election petition under section 86 (1) of the Act, an insignificant variation in the true copy cannot be construed as a fatal defect.”

It is evident that the Constitution Bench of the Supreme Court, by its observations, has diluted rigour of Section 86 (1) as a result of non-compliance of Section 81 (3). It will have to be seen on the facts and circumstances of each case whether the defect is vital defect in substance or the same is insignificant variation. In fact, by observations in paragraph 43 in the Matter of T.M.Jacob, the Supreme Court has held that the doctrine of ‘substantial compliance’ can be invoked/imported into Section 86 (1). These observations read thus;

“ We are unable to agree with Mr. Salve that since proceedings in election petition are purely statutory proceedings and not ‘civil proceedings’ as commonly understood, there is no room for invoking and importing the doctrine of substantial compliance into Section 86 (1) read with Section 81 (3) of the Act.”

Naturally, in order to succeed in her contention that the election petition is not maintainable for non-compliance of Section 81(3) of the R.P Act, Respondent No. 1 will have to discharge the burden of proof that there is non-compliance of Section 81 (3); and in addition, she will also have to demonstrate that it is not a case of even substantial compliance.

AIR 2005, SC 22, Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh and others, was relied upon by the learned Counsel for the Petitioner for the purpose of claiming that the petitioner can be directed by the court to supply copies and make the deficiency good. However, this was a case regarding non-compliance of requirement of Section 83. It was alleged by Respondent therein that petition lacks in material particulars and that the affidavit filed in support of the election petition was not valid. It is settled position that non-compliance of Section 83 is not fatal to the maintainability of election petition. Therefore, reliance on the case of Sardar Harcharan Singh Brar, is of no assistance to petitioner.

Lastly, reliance was placed upon observations of the Supreme Court in the matter of Dr. Vijay Laxmi Sadho v

Jagdis, AIR 2001 SC 600, and more particularly contents in paragraph 9, which read thus;

“An election petition is liable to be dismissed in limine under Section 86 (1) of the Act only if the election petition does not comply with either the provisions of ‘Section 81 or Section 82 or Section 107 of the Act.’ The requirement of filing an affidavit along with an election petition in the prescribed form in support of allegations of corrupt practice is contained in Section 83 (1) of the Act. Thus an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83 (1) of the Act or of its proviso.”

In the matter at hands, Respondent No.1 has only claimed non receipt of copy of the affidavit. Impliedly, it was tried to be suggested that the petition must not have been filed together with the affidavit. But, we have already ruled out such a probability, in view of the fact that the petition was presented before the Registrar (Judicial) on 28-6-2004 on the same day on which the affidavit, as required by Rule 94 (A) was sworn by the election petition.

So far as issue regarding filing of copies of affidavit, as a part and parcel of copies of petition is concerned, there are couple of circumstances suggesting negative possibility and at the same time there are good number of circumstances suggesting positive.

As pointed out by Advocate Kanade, although the “affidavit” is incorporated in the index, even original affidavit accompanying Election Petition is not paged and those page numbers are not incorporated in the index, against the entry “affidavit”.

On 29th May 2007, while dictating part of this order, I have opened the sealed envelope kept in the custody of Registrar (Judicial). It contains two copies of notice along with two copies of election petition. Each Set comprises of a copy of notice, index containing items 1 to 24 at page 1 to 135 and Vakalatnama, memo of address and affidavit as last three items of the index and yet a footnote at the bottom is that “last page is 135.” The second set is said to have been served on Respondent No.1 through Registered Post A.D. Fact that copies of petition served upon Respondent No.1 filed by her with office, with the permission of this court, for safe custody, do not contain copies of affidavit, suggests a negative probability. But, at the same time, existence of entry “affidavit” in the index, although without page numbers of it, suggests that a copy of affidavit could have been added to the annexures of the petition. Even the copy of the petition served on Respondent No.1 contains the index which enlists “affidavit” as last item and this compels us to give a serious thought to the delay on the part of Respondent No.1 in raising the plea that a copy of affidavit is not served upon her.

No doubt, examination sheet of this registry is not as accurate as in the matter of Chandrakant Chodankar (I have perused the examination sheet from part-II of the record), yet the fact that election petition was ordered to be registered, would lead to presumption that the same was complete in all respects, as required by Section 81 and 83. In fact, it cannot be lost sight of that every litigation, and not only election petition by virtue of Section 83 of the RPA; is required to be presented with equal number of copies for being served upon the respondents. And hence, the registration would raise a presumption that, as many Respondents, that many copies of petition must have been filed, thereby creating a burden of proof on Respondent No. 1 to prove that equal number of copies were not filed or that the copies filed were incomplete, as laid down in the case of Chandrakant Chodankar (supra).

Apart from delay in raising the objection (on reference to part-II of the record, it can be verified that the notice of election petition was served upon Respondent No. 1 though her Personal Secretary Shri S.Z. Malpani on 10-10-2004, as Respondent No. 1 was out of town) because the objection regarding non receipt of copy of affidavit along with other annexures of petition, was raised for the first time on 20-12-2004, there are other reasons for this delay operating adverse to contention/objection raised by Respondent No. 1.

The objection was raised on 20-12-2004 and this was in spite of the fact that on 3-11-2004 and 24-11-2004 Respondent had appeared through Advocates Shri M.S. Patil and B.R. Sontakke Patil and prayed for adjournment to file Written Statement, by applications Exhibits 5 and 8 respectively.

The matter does not end here. The objection is raised by Applications Exh. 11 and 16 Application Exhibit 11 was not supported even by solemn affirmation of Respondent No. 1 and probably that is why Exhibit 16 repeating contents of Exh. 11 was filed on 13-1-2005 together with, verification affirmed by Respondent No. 1. Thus, objection for the first time has come on record on 20-12-2004 and the same is supported by respondent No. 1 only on 13-1-2005.

As pointed out by Advocate for petitioner, Respondent No. 1 in her chief examination did not assert non-receipt of copy of affidavit, on the contrary in paragraph 1 of her cross examination, she has admitted receipt of all annexures of election petition with the notice. Relevant portion of deposition reads thus;

"I had received copy of the petition along with copies of all its annexures. From the date of receipt of copy of petition along with its annexures till 3-11-2004 i.e. the date of appearance, I had not lodged any complaint with Registrar of the Court or Court itself regarding non receipt of copy of any documents or annexures."

Having examined the copies of notices, bearing endorsements of Respondents in acknowledgment of

receipt of original, it is noticed that the notice of Respondent no. 1 was served on her Personal Secretary Shri S.Z. Malpani, who is examined as witness No. 7, at Exhibit 94, for Respondent No. 1. This witness did not depose anything about non-receipt of any annexure to election petition, when he received notice on behalf of Respondent No. 1 along with copy of election petition. In fact, if the fact is taken into account that the notice of election petition was received by R.W. Shri S.Z. Malpani, the evidence that copy of affidavit was not part and parcel of annexures to copy of election petition, ought to have come from him. Viewed thus, solemn affirmation of Respondent No. 1 supporting Exhibit 16 is also of no value. That the copy of election petition served (deposited by Respondent No. 1 with Court) contains copy of index which registers affidavit as last item, is a guarantee that it was possible for R.W. No. 7 or Respondent No. 1 to ascertain whether all annexures to petition are/are not received with the copy of election petition served along with notice.

The submission on behalf of the petitioner that Respondent No. 1 has not proved non receipt of copy of affidavit along with copy of petition, therefore, will have to be upheld.

14 Presuming it for the sake of argument that Respondent No. 1 has not received a copy of affidavit as under rule 94-A together with copy of petition, it becomes necessary to consider, if that immediately requires consequences as per Section 86(1) to follow. In T.M. Jacob AIR 1999 S.C. 1359, a decision of Constitution Bench of the Supreme Court, couple of earlier decisions of different Constitution Benches and observations therein, were referred with approval i.e. cases of Murarka (AIR 1964 SC 1545) and Ch Subbarao AIR 1964 SC 1027. What is the meaning of word "copy" for the purpose of Section 81(3) as laid down by the Supreme Court in Murarka's case, is already reproduced hereinabove, as borrowed in para 23 of Chandrakant Chodankar's case relied upon by the learned Counsel for petitioner.

In paragraph 39 of T.M. Jacob's case, ratio laid down by the Supreme Court in Ch. Subbarao's case, in its judgment paragraph 25, was referred with approval. The observations in Ch. Subbarao's case read thus;

"In view of the decision of this Court, it would be clear that if there is a substantial compliance with the requirement of Section 81(3), the election petition cannot be dismissed by the tribunal under section 90 (3) [old, now section 86 (1)]."

Earlier in paragraph 19 of Ch. Subbarao's case, the Supreme Court observed thus;

"While we are conscious of the need for expeditious disposal of election petitions and for the strict enforcement of provisions designed to achieve this purpose, we cannot be oblivious to the circumstance

that to read every requirement literally might equally defeat the purpose for which part-VI is intended viz that elections are conducted in accordance with the relevant statutory provisions framed to ensure purity and orderliness and that the candidate who has not obtained majority of valid votes or has obtained it in flagrant breach of the statutory provisions is not held entitled to represent the constituency."

Deficiency in the matter at hands is peculiar one, in the sense it is not alike deficiencies in the reported cases referred so far. In all the reported cases, there were some defects in the copy supplied to respondents, but in none of the cases there was grievance of supply of incomplete copy. Hence, at first blush one feels that the deficiency in the present case is more grave than the deficiencies in the reported cases. But, it must be taken into consideration that this is not a case wherein affidavit is not filed at all. I have, for the reasons discussed earlier, already ruled out the possibility suggested by defence that no affidavit is filed, because copy of affidavit is not served upon Respondent No. 1. The only deficiency, if at all, was non-supply of copy of affidavit to Respondent. On reference to proviso to Section 83(1), it is evident that filing of an affidavit supporting the allegations of corrupt practices is a requirement of that provision and therefore the deficiency on that count is curable, provided it is so done within limitation prescribed by Section 81(1), as laid down in the judgments of Constitution Benches of the Supreme Court in the matters of *Balwan Singh vs. Laxmi Narayan* AIR 1960 S.C. 770 and *Murarka Radhey Shyam* AIR 1964 SC 1545.

Observations of the Supreme Court in the matter of *T.M. Jacob* (supra) in para 41, and terminal part of para 42, are as under;

"The expression 'copy' in Section 81(3) of the Act, in our opinion means a copy which is substantially so and which does not contain any material or substantial variation of a vital nature, as could possibly mislead a reasonable person to understand and meet the charges/allegations made against him in the election petition. Indeed, a copy which differs in material particulars from the original cannot be treated as a true copy of the original within the meaning of Section 81(3) of the Act and vital defect cannot be permitted to be cured after expiry of the period of limitation."

In paragraph 42, it is observed :—

"Defects in the supply of true copy under Section 81 of the Act may be considered to be fatal, where the party has been misled by the copy on account of variation of a material nature in the original and copy supplied to the respondent. The prejudice caused to the respondent in such cases, would attract the

provisions of Section 81(3) read with Section 86(1) of the Act (emphasis added)."

The question to be considered, therefore, would be whether there was any material or substantial variation of a vital nature in the copy supplied to Respondent, [In our case, grievance is about non-supply of copy of affidavit required by proviso to sub-section (1) of Section 83 of the R.P. Act.], which would cause prejudice to Respondent No. 1 in her defence of the election petition. To search the answer, a reference to form 25 in which the affidavit is required to be sworn and filed, is inevitable.

Affidavit

I,.....the petitioner in the accompanying petition calling in question the election of Shri/ Smt.....(Respondent No.....in the said petition) make solemn affirmation/oath and say;

(a) That the statements made in paragraphsof the accompanying election petition about the commission of corrupt practice of /*.....and the particulars of such corrupt practice mentioned in paragraphs.....of the same petition and in paragraphs.....of the schedule annexed thereto are true to my knowledge.

(b) that the statements made in paragraphs.....of the said petition about the commission of the corrupt practice of /*.....and the particulars of such corrupt practice given in paragraphs.....of the said petition and in paragraphs.....of the schedule annexed thereto are true to my information.

Solemnly affirmed/ sworn by Shri/ Smt.....before me.....at.....thisday of.....

Magistrate of the first Class/ Notary/Commissioner of Oaths.

"/*(here, specify the name of corrupt practice)."

Thus, it is evident that the purpose of affidavit is requirement by petitioner to bind himself on oath, regarding which parts of the petition and allegations contained therein, as also schedule thereto, are true to his personal knowledge and which are true to his belief. At the most, brief name of corrupt practice is required to be referred to in the affidavit. In the present matter, it will be "by publication of false imputation against personal conduct and character of the petitioner.", thereby indicating that corrupt practice as defined by Section 123 (4) of the R.P. Act is alleged to have been committed. In this context, observations of the Supreme Court in the matter of *T.M. Jacob* in paragraph 40 of the judgment are required to be referred.

"Object of serving a 'true copy' of election petition and the affidavit filed in support of allegation of corrupt practice on the Respondent in the election petition is to enable the Respondent to understand the charge against

him so that he can eccetively meet the same in the written statement and prepare his defence. The requirement is thus; of substance and not of form." (emphasis added)

It is compulsory on the petitioner to file an affidavit supporting the allegation of corrupt practice and as can be seen from proviso to Section 83 (1), such compulsion is only when petition alleges indulgence into corrupt practice, either by the returned candidate himself or any other person for benefit of returned candidate. Affidavit is not necessary, if election is challenged on the ground other than corrupt practice. The purpose of affidavit thus, can be visualized, is to compel the petitioner to be resonsible while making allegation of indulgence into corrupt practice by returned candidate at the election. The allegations cannot be raised light heartedly and, therefore, those are required to supported by the affidavit. Yet, on going through 'form of affidavit', it can be seen that it contains no details which will be required to be denied or answered by the contesting Respondent through his written statement. Affidavit, although inseparable part of the petition, is a requirement compelling the petitioner to be responsible person while making allegations of corrupt practice at the election, by the returned candidate. All the details, material facts and particulars regarding alleged corrupt practice are contained in the election petition and affidavit, which is second part of the election petition, is solemn affirmation by the petitioner that he believes the allegations raised in the election petition regarding corrupt practice, to be true, either on the basis of his personal knowledge or information received by him. Deficiency of non-service of a copy of affidavit, therefore, seems to be deficiency about the requirement, not of the substance but of the form. This should stand confirmed by the fact that the requirement of filing of affidavit is contained in Section 83 (1) which is curable, if there is omission on that count. Non-supply of copy of affidavit, in my considered view, does not cause any prejudice to Respondent in preparing her defence, since she is made aware of the alleged corrupt practice, by a copy of petition and the contents described therein. By non-supply of copy of affidavit, Respondent No.1 could have been, for some period, kept under wrong impression that election petition is filed without affidavit as required by Rule 94-A and in form No 25. But, the affidavit is very much on record.

In the peculiar facts and circumstances of the case, it must be said that Respondent No.1 has "not proved" non-

supply of copy of affidavit. And for the sake of arguments, even if it is presumed that copy of affidavit in form No.25 was not supplied to Respondent No.1 together with a copy of election petition, lacuna is pertaining to the form and not pertaining to the substance. There was no likelihood of any prejudice being caused to Respondent No.1 in preparing her defence. Viewed thus, it must be said that even if copy of affidavit is not served upon Respondent No.1, because affidavit in original is filed together with petition, there is substantial compliance of section 81 (3) and hence, consequences as laid down by Section 86 (1) of the R.P. Act need not follow. Issue No.1 as framed by my learned predecessor, or issue No.5 as framed by me, will have to be answered accordingly.

15. As a result of discussion hereinabove, I have reached a conclusion that the election petition is maintainable, since the submission that it is liable to be dismissed under Section 86 (1) in view of non-compliance of requirement of Section 81(3) of the R.P. Act, is held not sustainable. Issue desired by Respondent No.1 to be decided as preliminary issue is answered accordingly.

So far as conduct attributed to Shiv Sena M.L.A Shri Shivsharan Birajdar by his speech at the election campaign meeting held on 13-4-2004 at Naikwadi Nagar, Osmanabad, is concerned, the same does not constitute corrupt practice as defined by Section 123 (4) and, therefore, issue No.5 as framed by my learned predecessor and issue No.2 (e) as framed by me shall stand answered in the negative (corrupt practice as attributed to Shri Shivsharan Birajdar).

16. Issue separate notices to Shri Krishna alias Shrikrishna alias Dadasaheb Kshirsagar and Shri Balasaheb Thakre (at the addresses to be furnished by the petitioner) under proviso (a) to Section 99 (1) of the R.P. Act, directing each of them to show cause as to why he should not be named as a person having been guilty of corrupt practice of the nature alleged in the petition. They may be informed that, appart from filing say, they will have a right to cross examine the witnesses already examined by the High Court and who have given evidence against them and also of calling evidence in their defence Notices returnable on 2nd July, 2007.

[No. 82/MT-HP/(1/2004)2008]

By Order,

S. K. RUDOLA, Secy.